Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SHIRLEY A. LANG, *et al.*,

Petitioners,

v.

KOHL'S FOOD STORES, INC. and
THE GREAT ATLANTIC TEA COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in affirming the district court's dismissal of petitioners' Title VII claim on summary judgment by failing to follow the standards for review articulated by *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097, 2109-10 (2000), when it upheld the district court's rejection of petitioners' proof of intent as not persuasive or compelling, while failing to consider all the evidence supporting petitioners' position and further failing to disregard respondents' evidence that "the jury was not required to believe." 120 S.Ct. at 2110.

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The opinion of the United States Court of Appeals for the Seventh Circuit is *Lang v. Kohl's Food Stores, Inc. and The Great Atlantic Tea Company,* 217 F.3d 919 (7th Cir. 2000). It is set forth in the Appendix at App. 1-15.

The opinion of the United States District Court for the Western District of Wisconsin is not reported. It is set forth in the Appendix at App. 19-79.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the District Court for the Western District of Wisconsin was entered on June 22, 2000. (App. 1-15) The Court's order denying rehearing was entered on August 3, 2000. (App. 80) This petition for writ of certiorari is filed within ninety days from that date. This Court has jurisdiction under 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are:

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation- . . . because of . . . sex,

and the Equal Pay Act ("the EPA"), 29 U.S.C. § 206(d):

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate he pays to employees of the opposite sex . . . for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions . . .

STATEMENT OF THE CASE

This petition seeks a writ of certiorari to the court of appeals from its affirmance of summary judgment on petitioners' Title VII claim. It turns on the court of appeals' failure to consider evidence it was required to consider under *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000), because it supported petitioners' pretext case and their proof of discriminatory animus, and the court's failure to *disregard* evidence that *Reeves* required it to disregard. This Court should either grant certiorari and reverse or, in the alternative, vacate the judgment below and remand for reconsideration in light of *Reeves*. *See infra* at 12-13.

Petitioners are current and former female employees of respondents, Kohl's Food Stores, Inc. and (its parent) The Great Atlantic & Pacific Tea Company, Inc., who have worked in the bakery and deli departments of respondents' supermarket chain. They claim that they have been paid less than respondents' produce department employees because of their sex.

For more than 40 years, the three departments (bakery, deli and produce) have been segregated by sex. As far back as the 1950s, the produce staff was predominantly male (R. 217 ¶ 50) and the deli and bakery staffs overwhelmingly female.[1] As of 1998, the pattern remained: 100% of the bakery managers, 100% of the deli managers, 97% of the bakery clerks, and 92% of the deli clerks were female. (App. 48) In the produce department, 93% of the produce managers and 78% of the produce clerks were male. (*Id.*)

Bakery and deli employees have also always been paid less than produce employees. Indeed, respondents' early collective bargaining agreements established separate (and lower) wage scales for the "female" employees who staffed the bakery and deli than for "male produce" employees. (R. 305 ¶ 1; R. 217, Exs. 1-4) Even after these explicit gender classifications and wage scales were eliminated, the jobs remained segregated by sex, and the wage gap remained. (*Id.* at 48-50)

Petitioners brought this action on May 8, 1998 under both Title VII and the EPA, alleging that respondents' practice of paying bakery and deli employees less than produce employees constituted intentional wage discrimination under Title VII and a denial of equal pay under the EPA. (R. 2) The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1332(e)(1).

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[1] It was "not normal" to see a man behind the deli counter (R.305 ¶ 4); "[t]here might have been a male here and there" in bakery. (*Id.*)

The Title VII claim was certified under Fed. R. Civ. P. 23 on March 17, 1999 on behalf of a class of all women employed in the bakery and deli departments since November 21, 1995. (R. 116 & 117) During the course of the lawsuit, 500 opt-in plaintiffs joined the lawsuit in pursuit of the EPA claim. (R. 40, 49, 67, 68 and 80)

On May 7, 1999, respondents moved for summary judgment on both petitioners' Title VII and their EPA claims. (R. 176) On July 26, 1999, the court granted the motion with respect to the Title VII claim but sent the EPA claim to trial. (App. 79) On August 13, 1999, the jury found that the bakery, deli and produce jobs were not substantially equal. (R. 297) Judgment was entered dismissing both claims on August 16, 1999. (A. 67-68) Petitioners' motion for a new trial on the EPA claim and reconsideration of the Title VII claim was denied on August 30, 1999. (App. 18) The court of appeals affirmed the district court on June 22, 2000 (App. 1-15) and denied rehearing on August 3, 2000. (App. 80)

This petition addresses only the Title VII claim, most particularly the court's rejection of petitioner's contention that respondents' asserted justifications for the challenged wage gap were pretextual.[2] Respondents' sole witness on summary judgment to testify to the reasons for the wage decisions at issue was its human resources manager and wage negotiator, Dan Daley. (R. 178) In his declaration supporting the summary judgment motion, Daley asserted that respondents' decision to maintain the

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[2] Petitioners also challenge the lower courts' handling of their "animus" evidence, and specifically the courts' failure to consider their evidence of present-day steering. *See* n. 3, *infra*.

challenged wage disparity was motivated not by the employees' gender, but by differences among the jobs (*i.e.*, that the produce jobs required greater discretion and physically harder work and produce departments contributed more to store revenues). (R. 178 ¶¶ 199-205)

In response, petitioners offered two categories of evidence of discriminatory intent: evidence of conduct by respondents reflecting animus against its female employees, and evidence that respondents' justifications for the wage gap at issue were pretext. Petitioners' "animus" evidence included: (a) the union contracts from the 1950s and 1960s in which respondents established separate (and unequal) pay scales for "male produce employees" and for "female employees" in other jobs (R. 305 ¶ 1, R. 217, Ex. 1-3), (b) evidence that, through the late 1960s, respondents advertised for bakery and deli jobs in the female-help-wanted classifieds and produce jobs in the male-help-wanted columns (R. 305 ¶¶ 1-2), and (c) evidence linking these historical practices to the present: *i.e.*, evidence of restrictive seniority and bidding rules that discouraged women from transferring from bakery and deli into produce (R. 217 ¶¶ 51-53), and evidence, based on respondents' application data from 1996-98, that showed that during the 1990s, respondents were steering female job applicants to the lower-paid bakery and deli jobs and away from produce. (*Id.* ¶ 55, R. 305 ¶ 3)

Petitioners' pretext evidence consisted primarily of a series of admissions by Daley himself that suggested that the justifications for the wage disparity asserted in this declaration did not actually motivate the wage decisions at issue. First, Daley admitted that he testified falsely in

his declaration about the market-based origins of the wage gap, in that his testimony on the subject was based on rumor and had no basis in fact. (R. 178 ¶ 200; R. 217 ¶ 56) Second, Daley admitted that his claim in the declaration that petitioners' unions had not demanded wage equalization until 1998, offered as a reason that the wages were never equalized, was also false (R. 178 ¶ 201; R. 217 at ¶¶ 57-61), since union demands for equalization had been made in every negotiation since 1992. (R. 217 at ¶¶ 57-61)

Daley made additional admissions that contradicted his claim that the wage determinations were motivated by differences between the jobs, not gender. First, he admitted that he had not "developed" the differences as the rationale for the wage gap until *after* he negotiated wages in 1995 (*id.* at ¶ 62), and therefore did not have them in mind when the actual wage decisions were made. (*Id.* at ¶¶ 62, 64) Next, he admitted that he had never discussed the differences with the union negotiators, his superiors, or his bargaining team, that he could not identify a single company official who was even aware of them, and that the differences had never been documented as factors in wage setting. (*Id.* at 63, 64) Third, with respect to the particular differences asserted, Daley admitted that these were not in fact taken into account in the setting of wages. (*Id.* at 40, 65-68, R. 215 at 238; R. 198 ¶ 205 [revenues]; R. 215 at 246 [judgment]; R. 217 ¶¶ 26-27; R. 198 ¶ 205 [volume and weight])

Daley's untruths and inconsistencies, petitioners asserted, in combination with petitioners' evidence of discriminatory animus, supported an inference that

Daley's testimony about what motivated the wage decisions was not credible, and that the real reason for the wage gap was gender. *See Reeves*, 120 S.Ct. at 2108-09. In granting summary judgment, however, the district court ignored most of petitioners' evidence and relied on evidence the jury was not required to believe.

First, the court rejected petitioners' "animus" evidence because it did not "compel" a finding of discriminatory intent. (App. 75-76) Specifically, it rejected the historical evidence as too remote in time, the evidence that the departments remained sex-segregated during the 1990s as not "shocking," and the restrictive seniority and bidding rules as supporting, but not compelling that finding. (App. 75-76) The court did not mention petitioners' steering evidence.[3] (*Id.*)

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[3] The court of appeals decision reflects confusion about whether this evidence was ever presented in the district court. (App. 4-5) In fact, petitioners asserted their steering evidence throughout the case. (*See* CA Petition for Rehearing) Even though the district court refused to certify a "steering" class (R. 116), ultimately dismissed the individual steering claims of the named plaintiffs (all long-term employees hired before the actionable period, who could not themselves claim steering at hire) (R. 255), and in doing so, erroneously rejected the steering evidence as not probative (*id.*), and even though petitioners chose not to pursue either the class certification ruling or the ruling on the individual claims on appeal, petitioners still continued to press the steering *evidence* as a central element of their proof of intent. (CA Appellants' Brief at 7, 30) The district court simply ignored the steering evidence in analyzing the class wage claim; and the court of appeals, while recognizing that proof of steering would have made petitioners' Title VII claim "tenable," *see* n. 4, *infra*, premised its affirmance

Second, the court rejected petitioners' pretext case as not "persuasive." (App. 78-79) In doing so, it ignored much of petitioners' evidence on the issue. It ignored petitioners' evidence that Daley lied about the history of the wage gap and about the unions' early demands for equalization. (App. 76-78) It ignored Daley's admissions that the job differences asserted as motivating the wage disparity were not in fact taken into account when wages were set (even though these admissions contradicted Daley's assertion that they were the *motivation* for the wage decisions). (*Id.*) Indeed, the court limited its review to a single aspect of petitioners' pretext case, evidence that Daley formulated the asserted justifications "after the fact" of the 1995 wage negotiations. Concluding that this evidence was not "persuasive," the court chose instead to credit Daley's testimony that the asserted differences were the motivation for the wage gap, as well as respondents' attempts to explain their late emergence after the fact. (App. 77-78; R. 210 at 39)

On appeal, petitioners argued that the district court had applied the wrong standard of review. Regardless of the disposition of the jury verdict, they argued, the Title VII claim turned on whether respondents were paying bakery and deli employees less because they were women. The question on summary judgment was not whether petitioners' evidence of discriminatory intent was persuasive to the court or compelling, but whether it was sufficient as a whole to permit the requisite inference

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of the district court on the belief that no such evidence had been asserted or offered. (App. 4-5) This was entirely contrary to the record. *See* CA Petition for Rehearing.

by the jury. (CA Appellants' Brief at 22-33) Without addressing the standard for summary judgment review, however, the court of appeals affirmed.[4] (App. 2-4)

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[4] Addressing the pretext issue first, the court essentially reported the district court's conclusion, without its own analysis of the record, that petitioners had "produced no persuasive evidence" that respondents' justification was pretext. (App. 2-3) Like the district court, the court of appeals appeared to confuse the question of whether Daley honestly believed that the asserted differences existed with the real question – whether Daley testified honestly when he asserted that the differences were his motivation for the wage decisions.

Regarding petitioners' other evidence of "animus," moreover, the court of appeals' discussion was confused and misleading. It began by asserting that it was "hard to see" why, given the jury's verdict on the EPA claim, petitioners' contention that summary judgment should have been denied on the Title VII claim "could matter." (App. 4) "If (as the jury determined) the bakery, deli and produce jobs are not substantially equal," the court asserted, "then plaintiffs can't show sex discrimination." (*Id.*) This proposition conflicts directly with *County of Washington v. Gunther*, 452 U.S. 161 (1981), in which the Court made clear that a Title VII claim is *not* barred by the fact that the jobs compared are not equal under the EPA. Indeed, the Court pointed out how outlandish any other result would be:

> [A] woman who is discriminatorily underpaid could obtain no relief – no matter how egregious the discrimination might be – unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would

REASONS FOR GRANTING THE WRIT

The writ should be granted. Had the court of appeals followed this Court's clear instructions in *Reeves* dictating what evidence to consider and what to disregard, the disposition of petitioners' appeal would almost certainly have been different. *Reeves*, decided only ten days before the court appeals' decision in this case, was (and remains) best noticed for its holding that evidence of pretext alone can be sufficient to support a jury finding of discrimination. Importantly, however, *Reeves* also resolved widespread confusion among the lower courts regarding precisely what evidence a court must consider on summary judgment under Fed. R. Civ. P. 56, and what evidence it must disregard. 120 S.Ct. at 2109-10. In reviewing petitioners' evidence and the district court's analysis, the

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have been higher had she been male, the woman would be unable to obtain legal redress.

452 U.S. at 178-79.

Next, while appearing to retreat from its first proposition (that the Title VII claim was barred by the jury's verdict), the court fell into a second misstatement of the law – that the only way a plaintiff could prove intentional discrimination was to show that the employer discriminated when hiring for the different jobs. (App. 4) While it is true that evidence that women are steered to lower paying jobs suggests an intent to pay women less because of gender, other evidence (such as the evidence offered by petitioners) can also raise this inference. *Gunther*, 452 U.S. at 178-79.

Finally, as noted *supra* at n. 3, the court of appeals disregarded petitioners' evidence of steering under the erroneous belief that no such evidence had in fact been offered.

court of appeals neither cited *Reeves* nor followed its directives on these questions.

Specifically, *Reeves* held that the court must *disregard* "evidence favorable to the moving party that the jury is not required to believe." 120 S.Ct. at 2110. It can give credence to evidence supporting the moving party only when it is *uncontradicted* or *unimpeached*, but evidence supporting the moving party that *has* been contradicted or impeached must be disregarded. As *Reeves* also held, the court must give credence to all evidence favoring the nonmoving party. 120 S.Ct. at 2109-10.

On the pretext issue in the present case, in particular, the court of appeals was required by *Reeves* to consider, as "evidence supporting the non-moving party," Daley's admissions that he had misrepresented material facts in his declaration, as these admissions plainly impeached Daley's credibility. *Reeves* also required the court to consider petitioners' evidence that the asserted job differences were not the true motivation for the wage gap – *i.e.*, Daley's admissions reflecting that those differences were *not* taken into account in the setting of wages – as these plainly contradicted Daley's contrary position. The court failed to address any of this evidence, however.

The court compounded these errors, moreover, in summarily adopting the district court's rejection of what small portion of petitioners' evidence it did address, the evidence that Daley's explanations for the wage gap were formulated after-the-fact. It did so because it credited evidence it was required to disregard under *Reeves* – Daley's testimony about the reasons for the wage gap and

respondents' explanations for those reasons' belated formulation. (App. 78; R. 210 at 39) This evidence, having been both impeached and contradicted, was evidence that the "jury [was] not required to believe." 120 S.Ct. at 2110.

If the court had considered all of the evidence supporting petitioners' case as *Reeves* required, and disregarded evidence that petitioners had impeached, the outcome of the appeal would almost surely have been different.[5] Petitioners accordingly urge the Court to grant the writ and reverse the court of appeals or, in the alternative, vacate and remand for reconsideration in light of *Reeves. Board of Trustees v. Sweeny*, 439 U.S. 24, 26 (1978) Although this latter disposition (grant, vacate and remand or "GVR") is best known for its use in cases in which the controlling Supreme Court opinion issues *after* the court of appeals decision on appeal, *Thomas v. American Home Products, Inc.*, 519 U.S. 913 (1996), a GVR is also appropriate where:

> *recent* developments that the Court has reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a

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[5] The same rationale applies to the court's review of petitioners' other "animus" evidence, in that the court ignored the most important piece of evidence supporting petitioners' position – evidence that respondents were steering women to the low paid bakery and deli jobs in the 1990s. That evidence, which the court of appeals recognized would have defeated summary judgment (App. 4), should have been considered as evidence supporting the non-moving party.

> redetermination may determine the ultimate outcome of the litigation.

Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company, 520 U.S. 893, 896 (1997) (emphasis added). Indeed, the Court described the situation in *Lords Landing* where the "recent" decision had issued 11 days before the decision by the court of appeals, as "virtually identical to" that in *Thomas*, in which the controlling decision was issued *after*. 520 U.S. at 896.

In the present case, a GVR would be proper for several reasons. First, *Reeves* was decided only ten days before the court of appeals decision below, and the court of appeals did not cite it and apparently did not consider it. This occurred perhaps because the applicable holding in *Reeves* was less widely publicized than the holding on the "pretext-plus" issue for which the case was widely noted when first decided. Second, it is plain that the court of appeals did not apply the standards for review announced in *Reeves* when it perfunctorily affirmed the decision of the district court (itself issued a year before *Reeves* was decided). Third, if *Reeves* had been followed, there is a strong likelihood that the result would have been different.

CONCLUSION

For the foregoing reasons, the writ should be granted and the decision of the Seventh Circuit Court of Appeals should be reversed or, in the alternative, summarily

vacated and remanded for consideration in light of this Court's recent decision in *Reeves*.

Respectfully submitted,

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In the
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No. 99-3377
SHIRLEY A. LANG, *et al.*,

Plaintiffs-Appellants,

v.

KOHL'S FOOD STORES, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States Court
for the Western District of Wisconsin.
No. 98-C-351-C – **Barbara B. Crabb**, *Judge.*

ARGUED APRIL 7, 2000 – DECIDED JUNE 22, 2000

Before BAUER, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Kohl's Food Stores, a grocery chain in Wisconsin, operates under collective bargaining agreements that establish wage classifications. Jobs in the bakery and deli departments fall into one classification, jobs in the produce department another. Two facts give rise to this litigation: pay in the produce department is higher, and workers are not distributed uniformly by sex. Most bakery and deli workers are women, while most produce workers are men. Plaintiffs, a class of women who work in the deli and bakery departments,

contend that the difference violates both the Equal Pay Act, 29 U.S.C. §206(d), and Title VII of the Civil Rights Act of 1964. Kohl's replies that plaintiffs are short-sighted: employees in the produce department are included within a pay category called "regular clerks," most of whom are female. That most regular clerks in the produce department are men does not undercut the fact that most regular clerks store-wide are women, Kohl's insists. The employer adds that women who want to be regular clerks in or out of the produce department do not face any discrimination in hiring or transfer. None of the class representatives applied for transfer to the produce department or another regular-clerk position; instead they want higher pay for their existing work. The ratio of wages between "department clerks" (the jobs plaintiffs occupy) and "regular clerks," Kohl's insists, is a subject for collective bargaining rather than for litigation.

After allowing the parties to conduct extensive discovery, the district court granted summary judgment for Kohl's on the Title VII claim. The judge exhaustively analyzed the duties of bakery, deli, and produce workers and concluded that plaintiffs could not demonstrate that Kohl's explanation for placing produce positions in the "regular clerk" classification was a pretext for sex discrimination. (The class includes supervisors and argues that bakery and deli managers do the same work as produce managers. Because the supervisors' arguments track those of the clerks, we use "clerks" as a generic term to simplify exposition.) Kohl's insisted that produce workers exercise greater discretion in displaying and culling produce and that produce jobs also are physically

harder than bakery or deli jobs. The district judge concluded: "Plaintiffs have produced no persuasive evidence suggesting that defendants did not honestly believe this justification or that it is a cover for discrimination." Honest belief is not enough under the Equal Pay Act, however, because that statute (unlike Title VII) does not require intent to discriminate. Section 206(d)(1) provides:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex[.]

The district judge concluded that two questions under this statute could be resolved only by trial: whether the positions in question are "jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" and, if so, whether the pay differential nonetheless is "based on any other factor other than sex". A trial culminated in a special verdict that answered the equal-work question in the negative; the jury then did not address the "factor other than sex" defense.

A substantial portion of plaintiffs' appellate brief is devoted to contending that the district judge should not have granted summary judgment on the Title VII theory.

Yet it is hard to see how this can matter, given the jury's verdict on the Equal Pay Act theory. If (as the jury determined) the bakery, deli, and produce jobs are not substantially equal, then plaintiffs can't show sex discrimination. Title VII does not require equal wages for comparable work, *see American Nurses' Association v. Illinois*, 783 F.2d 716 (7th Cir. 1986), or even for identical work. Identical jobs with different wages do not violate Title VII, provided that all employees may freely select which job to perform. Plaintiffs' Title VII claim thus is untenable – no matter the validity of the jury's special verdict, which we address below – unless Kohl's discriminated when hiring for the different classifications.

Plaintiffs make much of evidence that until the late 1960s Kohl's not only discouraged women from applying for certain positions but also had sex-segregated wage classifications. This practice is long gone, and no vestige of the discrimination survives. Wage schedules were merged 31 years ago, and, unlike the situation in *Bazemore v. Friday*, 478 U.S. 385 (1986), women hired during the discriminatory period today receive the same wages as men hired at the same time. What remains is the possibility that Kohl's steered applicants by sex or selectively offered them transfer opportunities. *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 524-25 (7th Cir. 1994). Neither the plaintiffs' charge of discrimination filed with the Equal Employment Opportunity Commission nor their arguments to the district court contended that Kohl's today steers women to bakery and deli jobs, or did so at any time within the period of limitations. Plaintiffs disavow a steering claim but contend that Kohl's history is

informative on the wage-discrimination claim. The district judge did not see how; neither do we.

Claims under the Equal Pay Act differ from comparable-worth arguments because proof that the two jobs are of the same (or comparable) value to the employer or society as a whole, or depend on similar effort or education, gets the plaintiff nowhere. To succeed under the Equal Pay Act the plaintiff must establish that the positions entail substantially equal tasks, performed under similar conditions. (The Act just says "equal," but it is common ground that "equal" does not mean "identical"; otherwise the employer could defeat an Equal Pay Act suit by adding an inconsequential and pointless chore to one of the jobs. Opinions commonly use the formula "substantially equal" to express the idea that trivial differences do not matter. *See Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989); *Epstein v. Secretary of the Treasury*, 739 F.2d 274, 277 (7th Cir. 1984). We follow that convention.) Kohl's provided the jury with plenty of evidence that tasks in the produce department differ substantially from those performed by bakery and deli workers. Produce workers do more heavy lifting and must exercise judgment about (for example) which fruit is ripe, which should be marked down, and how the produce should be displayed to maximize sales. Bakery and deli workers, by contrast, stock displays according to more mechanical specifications and use printed expiration dates rather than judgment to determine when inventory should be rotated or removed. Although a rational jury might have disbelieved this evidence or concluded that the differences are too slight to matter, and thus returned a verdict

in plaintiffs' favor, a verdict for Kohl's is invulnerable unless spoiled by trial error.

Plaintiffs contend that the exclusion of their expert witness is such an error. Howard Risher, a self-employed consultant with a Ph.D. in labor relations and economics, who teaches an undergraduate course on human resources as an adjunct professor at the University of Pennsylvania, prepared a report reaching conclusions favorable to plaintiffs. Stripped of self-congratulatory dross, this report is three pages long and consists of a list of clerks' duties and an unreasoned assertion that all three departments' positions are "virtually identical in terms of their basic function and are substantially equal in terms of skill, effort, responsibility and working conditions." The only support for this conclusion, however, is the list, with entries such as "[p]reparing products for display" and "[m]aintaining equipment". Risher did not analyze what the clerks *do* to achieve these objectives, and the district court concluded that a list plus a bald assertion would not assist the trier of fact. Fed. R. Evid. 702. Risher's deposition was as skeletal as his report; asked how employees at Kohl's carry out their duties, Risher replied only with variants on "I couldn't tell you" and "I have no idea". Apparently Risher thinks that job descriptions trump actual tasks, a sorry misunderstanding of the Equal Pay Act. *See Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 548 (7th Cir. 1991); *Fallon*, 882 F.2d at 1208. The district judge's decision to prevent Risher from testifying, far from being an abuse of discretion, *see General Electric Co. v. Joiner*, 522 U.S. 136 (1997), was absolutely correct. Many times we have emphasized that experts' work is admissible only to the extent it is

reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff – deploying neither data nor analysis – is not an acceptable methodology. *See, e.g., McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657-58 (7th Cir. 1998); *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

Risher also prepared a supplemental report, based on his discussion with eight bakery or deli workers in a "focus group." This report did little more than parrot these women's belief that bakery and deli duties require as much skill as produce duties. Relaying the plaintiffs' likely testimony is not an example of expertise. *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1086-87 (7th Cir. 1999). The report's final paragraph, however, says that Risher "used the Willis job evaluation system to confirm that the jobs would be evaluated the same in each department" and concluded that "the jobs would be evaluated exactly the same". Risher does not explain how the "Willis job evaluation system" works (or cite published literature providing that background), what data he used as inputs, or what outputs were obtained. Charts attached to the report are unintelligible without explanation, and Risher provided none. Readers must take everything on faith, and that alone would be good reason to exclude Risher's conclusion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The few references to the Willis system in the legal literature suggest that it is designed to identify comparable worth, rather than substantially equal tasks. *See AFSCME v. Washington*, 770 F.2d 1401, 1403, 1406, 1408 (9th Cir. 1985) (Kennedy, J.) (holding, on this ground, that Willis evaluations are unavailing). All plaintiffs do in response is assert that the Willis

system is "a recognized job evaluation system" that is "widely used by businesses" – which does nothing to fill in the blanks of Risher's report, or demonstrate that the Willis inquiry was relevant to this litigation.

Plaintiffs challenge a second evidentiary decision, which the parties call the "outlier ruling." Kohl's operates stores throughout Wisconsin. Some are much larger than others, and size affects not only the number of employees in each department but also the tasks to be done. Plaintiffs sought to compare the busiest bakery and deli jobs with the lightest produce jobs; Kohl's naturally would have preferred the converse. But the judge instructed both sides to compare the tasks of median jobs rather than the outliers at the largest and smallest stores. Plaintiffs contend that this ruling prevented them from showing that *some* bakery and deli jobs are substantially equal (in lifting, responsibility, and so on) to *some* produce jobs, indeed are more taxing than some produce jobs. As plaintiffs see things, the Equal Pay Act requires a person-by-person comparison rather than a categorical one.

To the extent plaintiffs rely on the proposition that employers cannot make up arbitrary categories and insist that these be the basis of comparison, they get no quarrel from us (or from the district judge). *See Thompson v. Sawyer*, 678 F.2d 257, 274-75 (D.C. Cir. 1982). But Kohl's did not make up the "department clerk" and "regular clerk" categories for this litigation, nor did it unilaterally decide to use the same wage scale throughout the state; the classifications and wages are the result of collective bargaining. Labor agreements frequently apply to all of an employer's sites, and these agreements are "factor[s] other than sex" that explain why the pay is identical at

large and small stores even though the tasks differ. If all plaintiffs have to go on is the difference across stores, then they have nothing, for this variation in the ratio between pay and the difficulty of employees' tasks is so obviously unrelated to sex that Kohl's would have been entitled to summary judgment under §206(d)(1)(iv). To get anywhere, plaintiffs had to make a categorical comparison between "department clerk" positions and "regular clerk" positions. Class treatment is appropriate only if there are common issues of fact – that is, only if it is possible to compare *all* "department clerk" positions in bakery and deli departments with *all* "regular clerk" positions in produce departments. The district court's outlier ruling ensured that the premise of class certification (granted at plaintiffs' behest) would not be subverted. It was not an abuse of discretion.

Two challenges to the jury instructions require only brief mention.

First, the instructions told the jury that it must determine whether the positions are "substantially the same" rather than "substantially equal." Plaintiffs express concern that the jury would treat "same" as equivalent to "identical," which these positions concededly were not. But using the word "equal" could lead to the same (an equal?) misunderstanding. Modifying either word with "substantially" overcomes the problem. The phrases "substantially the same" and "substantially equal" are substantially identical. The special interrogatory forms told the jury to determine whether the positions were "substantially the same," and the district judge sensibly tracked that language in the instructions; otherwise the

jury could have been confused by a difference between the instructions and the verdict forms.

Second, plaintiffs contend that the judge erred by telling the jury that documentary evidence such as position descriptions and training manuals – evidence that plaintiffs contend shows that bakery, deli, and produce positions have the same tasks – "could not be considered." An instruction saying this would indeed be erroneous, for an employer's manuals and descriptions are relevant to the question [sic] what the positions actually entail. But plaintiffs do not identify the supposedly erroneous instruction, and we could not find one that tells the jury not to "consider" paper evidence. What the judge actually told the jury is that a decision should not be "based upon job titles or job descriptions" but instead depends on "actual job duties and performance requirements." That instruction was absolutely correct. Training manuals and the like were relevant only to the extent they accurately described the actual job duties.

Last but not least is plaintiffs' contention that the district judge erred in informing the jury that the EEOC had found in Kohl's favor on plaintiffs' charge of discrimination under the Equal Pay Act. Before trial the district judge granted a motion *in limine* barring Kohl's from informing the jury about the EEOC's decision, but the judge changed her mind after plaintiffs' counsel told the jury that Kohl's agreed "under pressure of this lawsuit" to reduce the pay differential among the departments. Kohl's replied that the "pressure" came from its unions in collective bargaining, not from the suit; to add oomph to this assertion Kohl's wanted to inform the jury that the EEOC took a dim view of plaintiffs' chances. If even the

EEOC did not support plaintiffs, Kohl's sought to argue, then the "pressure of this lawsuit" could not have made a difference. This led the district judge to inform the jury about the EEOC's conclusion, in this language:

> At the time of the 1998 collective bargaining negotiations Kohl's had a determination from the Equal Employment Opportunity Commission that it had not discriminated against bakery and deli managers and clerks on the basis of their pay. At plaintiffs' request that the determination by the Equal Employment Opportunity Commission be reconsidered, the EEOC rescinded its determination. Before any redetermination had issued, plaintiffs' attorney decided to proceed with this lawsuit and therefore no determination was ever issued thereafter by the Equal Employment Opportunity Commission.

By asserting that the "pressure of this lawsuit" led to a change, plaintiffs' counsel implied that the suit had merit – *and that Kohl's knew that it had merit*. Kohl's was entitled to counteract this implication, the district judge thought, by showing that what Kohl's knew implied that it would prevail on the merits.

Many decisions by the EEOC are superficial, little more than precursors to right-to-sue letters. But this one was more thorough. Here is the Commission's own description:

> Our equal payment investigation considered whether or not the actual job duties of the deli and bakery manager positions and the deli and bakery clerk positions were substantially equal with respect to skill, effort, responsibility, and working conditions as those of the produce

> manager and produce clerk positions. To that end, detailed equal pay interviews were conducted with various incumbents of the produce manager and produce clerk positions. These interviews reflected that the produce jobs were dirtier, required more physical lifting of greater weight, more items with greater frequency than the deli and bakery jobs. Moreover, the produce areas are significantly larger than the deli and bakery areas in terms of physical square footage. There are far more items in produce than in deli and bakery and produce accounts for a greater percentage of store sales, i.e., higher sales volume. Produce employees are frequently called upon to help out in other areas of the store stocking the dairy case, retrieving the carts, et cetera. As a result, our investigation concluded that the jobs in question did not meet the required equal pay test and that they are not substantially equal with respect to effort, responsibility, skill or working conditions.

It is understandable that plaintiffs wanted to keep this damning passage from the jury's eyes, and they succeeded. The jury never learned the reasoning behind the EEOC's decision. Why plaintiffs' counsel, having secured a ruling excluding even a mention of the EEOC's bottom line, then opened the door is a mystery. Still, plaintiffs say, the jury should not have been told about the EEOC's conclusion because, by the time Kohl's agreed to reduce the pay differential to 5 cents per hour, the EEOC had rescinded its conclusion, so that the report did not counteract the inference for which counsel argued.

After receiving the EEOC's report (and the accompanying right-to-sue letter) in September 1997, plaintiffs

asked the EEOC to reconsider. In December 1997 the EEOC's District Director withdrew both the conclusion and the right-to-sue letter pending further review. *See* 29 C.F.R. §1601.19(b). Before the EEOC could do any further investigation, plaintiffs asked for a new right-to-sue letter, which the EEOC was obliged to issue forthwith. 29 C.F.R. §1601.28. Once it sent the right-to-sue letter, the EEOC called off its investigation and neither reissued the original report nor prepared a new one. The upshot was that, when plaintiffs filed their suit, there was no outstanding adverse decision by the EEOC. When she told the jury about the EEOC's conclusion, the district judge was under the impression that the negotiations to which plaintiffs' counsel referred took place before the District Director's order in December 1997. On learning that this was not so, the judge did not instruct the jurors to disregard the report (a direction that would have been futile in any event, sort of like telling the jurors that for the remainder of the trial none of them was allowed to say the word "rhinoceros" to himself).

Was there a significant chance that the jury would misunderstand the significance of the EEOC's decision, and the purpose for which it had been used – a chance so large that it requires reversal even under the deferential standard used to review a district judge's application of Fed. R. Evid. 403? We think not. Confusion over timing is regrettable, but the judge can't be blamed for the error in the opening passage of the instruction ("At the time of the 1998 collective bargaining negotiations Kohl's had a determination" . . .). That language had been drafted by the parties; the judge used it because the parties agreed

on it. Plaintiffs deny that they "stipulated" to the language, but no matter; they did not *object* to it, and that is that. Fed. R. Civ. P. 51.

Because plaintiffs sought to persuade the jury that Kohl's recognized its culpability, Kohl's was entitled to rebut this contention using the best available evidence: a decision by the EEOC that the positions were not substantially equal. *See Paolitto v. John Brown E.&C., Inc.*, 151 F.3d 60, 65-66 (2d Cir. 1998). Decisions by public bodies do not vanish into thin air or become un-documents when parties ask for reconsideration or settle their differences. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994); *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988). When negotiating with the unions, Kohl's knew the EEOC's view, which had been withdrawn as a result of plaintiffs' strategy but had not been disclaimed as erroneous. The 1998 negotiations occurred against a background that included the EEOC's support of Kohl's position, and this was relevant to the strength of the inference that Kohl's and the unions acted under the "pressure of this lawsuit" as plaintiffs asserted.

Doubtless there was a risk that the jury would overestimate the significance of the EEOC's ruling; this is why such conclusions generally are not admitted (on behalf of either side) in jury trials. *See Lathem v. Department of Children and Youth Services*, 172 F.3d 786, 791 (11th Cir. 1999). Plaintiffs note that the jury asked a question about the report during deliberations, implying that the EEOC's view assumed unusual significance. By opening the door to disclosure, however, plaintiffs took that risk; they could not argue as they did and then defang the best

response. *See United States v. McAnderson*, 914 F.2d 934, 946 (7th Cir. 1990). Nor can they avoid the consequence of their opening statement by contending on appeal (as they do) that "[w]hy Kohl's *narrowed* the gap in late 1998 is entirely peripheral" (emphasis in original). That may be, but it was plaintiffs who injected this subject into the case and entitled Kohl's to supply an answer. Plaintiffs did not argue to the district judge that the scope of the answer was too prejudicial and never suggested any possible response that was less prejudicial. The district judge protected plaintiffs' substantial rights by excluding the EEOC's actual language and reminding the jury that the conclusion had been rescinded. In response to the jury's question, the judge reread the instruction and added that the only issue properly under consideration was "whether the jobs are equal" rather than why Kohl's and the union changed the pay scales in 1998. The evidence and the instructions as a whole ensured that the jury focused on, and answered, the right questions. Plaintiffs had a fair trial.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHIRLEY A. LANG, STEPHANIE A. FLAIG, BETTY J. RANTHUM, PATRICIA J. SAN FILLIPPO, KAREN KOWALEWSKY, ROBIN HALL, CAROLYN McGOWAN, FLORANCE BINGNER, JUDY SCHROEDER, JULIE BULLEN, KATHLEEN A. TICE, CHRISTINE SCHANNING, ELAINE KRAWCZYK, LEAH LUDIN, and JEANNE RING, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KOHL'S FOOD STORES, INC. and THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Defendants.

ORDER

98-C-351-C

Plaintiffs have moved pursuant to Fed. R. Civ. P. 59 for a new trial on their Equal Pay Act claim and for reconsideration of the dismissal of their Title VII claim. Both motions will be denied.

With respect to the motion for reconsideration of the dismissal of the Title VII claim, it is unnecessary to add anything to the comprehensive discussion of that claim in the order entered in this case on July 26, 1999. Nothing in

plaintiffs present submissions convinces me that it is necessary to revisit those claims.

With respect to the motion for new trial on the Equal Pay Act claim, I am not persuaded that the jury's verdict was not supported by the weight of the evidence at trial or that rulings by the court were erroneous and prejudicial to plaintiffs. Because these matters were discussed at great length during the course of the trial, I see no reason to expand upon them in a written order. I will say, however, that I was convinced by the end of the trial that defendants had succeeded in showing that the pay disparity at issue was justified by the evidence that demonstrated that produce managers and produce clerks exercise significantly greater independent judgment in performing their jobs and that their job duties were considerably more onerous. I was persuaded also that plaintiffs were not justified in placing reliance on the written descriptions of produce, bakery and deli jobs that were prepared for use by assistant managers in gaining general familiarity with the tasks in each of these three departments. It became clear during the trial as it had not during the preparation of the summary judgment order that these listings of tasks were not intended to be exact or complete descriptions of the work done in those departments but were used only as check lists for persons headed for management jobs.

In addition, plaintiffs are simply incorrect in arguing that defendants cannot assert that produce managers' higher rates of pay are justified by the greater revenues and profits generated by their departments when produce employees and managers in low volume produce departments are paid the same rate as produce employees

and managers in high volume produce departments. The apparent discrepancies are the result of collective bargaining, which requires an employer to pay an entire group of employees at a single wage rate. Overall, produce departments generate greater revenue than bakery and deli departments; therefore, there is a valid reason to pay all produce managers more.

As to the disclosure of the rescinded Equal Employment Opportunity Commission determination, that issue was hashed and rehashed in discussions at trial. I believe that it was handled in as fair a manner as possible, given both the potential prejudice to plaintiffs of revealing it and the potential prejudice to defendants of not revealing it.

ORDER

IT IS ORDERED that plaintiffs' motions for a new trial pursuant to Fed. R. Civ. P. 59 and for reconsideration of the order dismissing their Title VII claim are DENIED. With the denial, it is not necessary to reach plaintiffs' request to set a briefing schedule on the two motions.

Entered this 30th day of August, 1999.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHIRLEY A. LANG, STEPHANIE A. FLAIG, BETTY J. RANTHUM, PATRICIA J. SAN FILLIPPO, KAREN KOWALEWSKY, ROBIN HALL, CAROLYN McGOWAN, FLORANCE BINGNER, JUDY SCHROEDER, JULIE BULLEN, KATHLEEN A. TICE, CHRISTINE SCHANNING, ELAINE KRAWCZK, LEAH LUDIN, and JEANNE RING, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KOHL'S FOOD STORES, INC. and THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Defendants.

OPINION AND ORDER No. 1

98-C-351-C

This employment discrimination lawsuit consists of two class-wide wage discrimination claims, one brought under the Equal Pay Act, 29 U.S.C. § 206(d), the other brought under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. 42 U.S.C. §§ 2000e(2), 2000e(3). In addition, class representatives are pursuing individual claims of discrimination on their own behalf. Plaintiffs are a class of former and current female employees of defendant Kohl's Food Stores, Inc., a

wholly owned subsidiary of defendant The Great Atlantic & Pacific Tea Company. According to plaintiffs, defendants have violated the Equal Pay Act and Title VII by paying managers and clerks in the predominantly female bakery and deli departments less than employees who hold these same positions in the predominantly male produce departments even though these jobs are substantially equal in skill, effort and responsibility and are performed under similar conditions.

The case is before the court on defendants' motion for summary judgment on plaintiffs' class claims. This motion will be granted in part and denied in part. I conclude that there is a genuine dispute of fact whether the positions of bakery, deli and produce clerk are substantially equal in skill, effort and responsibility. A similar dispute exists regarding the positions of bakery, deli and produce manager. Because there is also a jury issue whether the wage disparity between these positions can be explained by a factor other than gender, defendants are not entitled to summary judgment on plaintiffs' Equal Pay Act claims.

Although plaintiffs' Title VII wage discrimination claims manage to cross the prima facie threshold, plaintiffs are not able show that there is a genuine dispute that defendants' legitimate, nondiscriminatory reasons for the wage disparity are pretextual. For this reason, defendants are entitled to summary judgment on these claims.

Plaintiffs have filed motions to strike certain portions of defendants' summary judgment materials and to exclude certain evidence at trial. With one exception, all of the objections raised in the first motion are also raised

in plaintiffs' brief and in their responses to defendants' proposed findings of fact. Because I have taken these objections into consideration, nothing more is required. The motion to strike will be denied as moot. The one objection not found in plaintiffs' summary judgment materials is directed at an expert report appended to defendants' reply brief. Because the court has an affirmative obligation to review the validity of expert testimony, plaintiffs' motion to strike is redundant in this regard as well. A decision on plaintiffs' motion to exclude evidence at trial will be stayed because this motion is premature. The matters raised in this motion may be taken up at the final pretrial conference along all of the other issues related to how the trial will be conducted.

On a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir. 1997). For the purpose of deciding defendants' motion for summary judgment, I find from the parties' proposed findings of fact that there is no genuine dispute with respect to the following material facts.

UNDISPUTED FACTS

Kohl's Food Stores, Inc. is a Wisconsin corporation headquartered in Milwaukee, Wisconsin. It is a wholly owned subsidiary of The Great Atlantic & Pacific Tea Company, Inc., a New Jersey corporation. In September 1996, defendants owned and operated approximately 47

Kohl's grocery stores in Wisconsin. As a result of recent closings, this number is now 38. Plaintiffs are a class of current and former Kohl's employees who have held positions as managers or clerks in the bakery or deli departments. In addition, some plaintiffs manage both the bakery and deli departments in smaller stores or have held such positions in the past.

A. Kohl's Organizational Structure

Kohl's grocery stores are dispersed throughout four geographically defined districts. Each store has its own management hierarchy and is divided into several separate departments. These departments are managed by a "department head" or manager. In seven small-volume stores, one department head manages both the bakery and deli departments. Department managers report to store managers regarding day-to-day operational and store-related issues. Department managers also take direction from field merchandisers who are responsible for merchandising and marketing products in their respective departments. There are two bakery-deli merchandisers and two produce merchandisers, each of whom are assigned to specific stores within the four districts.

B. The Produce Department

Produce departments in defendant's stores can be divided into three different sizes: small, medium and large. Some of the salient characteristics of these departments are represented in the following table:

	Size of Department		
	Small	Medium	Large
Number	16	21	10
Sales/week	Less than $6,000	$8,000 - $12,000	$25,000 - $50,000
Items stocked	200	250	300 - 350
Staff needed to operate department	Managers: 1 PT clerks: 1 or 2	Managers: 1 PT clerks: 2 or 3 FT clerks: 1 or 0	Managers: 1 FT clerks: 3-4 PT clerks: 6-10

The selection of items stocked in produce departments changes seasonally.

1. Responsibilities of produce managers

Ordering. A primary responsibility of produce managers is ordering the produce for sale in their departments. Managers place orders on the basis of their department's merchandising plan; an inventory of product already in the store and its remaining shelf life; past sales and customer purchasing habits; and product availability, perishability and price. All produce managers place at least three orders each week. Managers in two of the larger departments place six orders in a single week. An order is written three days in advance of delivery. For stores located in the Milwaukee and North Shore (suburban Milwaukee) districts, nearly all of the product comes from defendants' produce warehouse in Milwaukee. Less than five percent of the product in produce departments is ordered from outside vendors.

Financial. Like all department heads, produce managers are responsible for making sure that their departments reach their sales goals and profit targets. The sales goals for produce departments are higher than those for bakery and deli departments. Managers of all departments must control their costs by reducing "shrink," the amount of product not sold because of over-ordering, inadequate rotation or improper handling and storage. In exercising this control, produce managers must apply extensive product knowledge and exercise substantial judgment on a daily basis. Shelf life varies from product to product depending on numerous factors including when the product was picked and how it has been stored. For example, strawberries can remain fresh for several days. However, if they are delivered wet, they will develop mold within a single day, rendering them unfit

for sale. A produce manager has the authority to reduce the price of wet strawberries in order to move them out of the store before they become moldy. Produce managers must think creatively in order to minimize loss. Oftentimes, this means repackaging damaged produce.

Product stocking, inspection and knowledge. Produce managers are responsible for the arrangement and display of produce in their departments. The produce must be displayed according to weekly merchandising plans and generally by family groupings. Because all produce departments are different sizes, managers must determine how to set up their displays in conformity with the general merchandising plans. Within these guidelines, managers are encouraged to use creativity in order to attract the attention of customers.

Each produce department has at least five fruit groupings and four vegetable groupings. Many stores have additional family groupings such as organics and value-added items, such as pre-packaged chopped lettuce. To arrange and display all of these products, managers must be able to identify a variety of different products, know the grouping in which they belong and insure that their employees can do the same. For example, defendants sell about fifteen different varieties of apples, many of which look nearly identical in shape and color. Their job is made easier by the fact that all boxes of produce arrive with a shipping tag that identifies their contents and many products are marked individually with stickers.

Managers must know how the various types of produce must be stored and how the product ripens. In addition, managers must convey this knowledge to their clerks when shipments are received. For example, bananas will stay green if they are kept in cold temperatures but will ripen faster if the ethylene gas in their storage bags is released. Managers must also know the origin of each item; how the item tastes (for example, whether grapes are sweet or sour); how to prepare it (for example, peeling an avocado, steaming a spaghetti squash); how long it will stay fresh; and how to select one at its peak (for example, melons are smelled for sweetness). Again, managers must be able to impart this information to customers and insure that their clerks are prepared to do the same.

Miscellaneous. In small and medium produce departments, managers regularly perform clerk tasks.

2. Responsibilities of produce clerks

Product stocking, inspection and knowledge. Like managers, produce clerks must be familiar with many different types of product stocked in their departments. For example, clerks must be able to differentiate among numerous varieties of grapes, know whether they are grown domestically or imported, whether they are seedless and whether they are sweet or sour. Shipping tags and stickers assist clerks in this process.

Clerks must know how to place product in the display racks and cases. Among other things, this means that the best side of a product should be face up; stem or stem ends should not show; the butt ends of leafy greens

should face the same direction; packaged and bagged items should be placed so that the labels are visible; and cut melons must be placed in a refrigerated case or nested in an ice bed.

Every morning, a produce clerk must cull the entire produce and floral department before any product is added to the displays. Culling is the process of removing wilted, bruised or unappealing product from the displays; it is similar to what shoppers do when selecting items to purchase. If the produce does not meet freshness, appearance and quality standards, clerks must use their judgment to determine which product can be reconditioned and which should be discarded. Only experienced clerks are permitted to discard unsaleable produce. Culling is a continuous process. In addition to the morning session, clerks must cull all produce displays at 10:00 a.m., 2:00 p.m. and 4:00 p.m. As they cull, clerks must freshen and straighten up displays. Depending on the size of the department, the day of the week, the time of day and the number of clerks in the department, culling may take from 15 minutes to two hours. More culling is necessary in large departments and on Mondays. On average, produce clerks spend between 1 and 3 hours culling produce each day. After the displays are culled in the morning, clerks must replaced culled product with fresh product, lay fresh ice beds (in stores where they exist) and stock crisped product and fresh melons prepared the night before.

Before restocking the produce area, clerks must make a list of the items needed on the racks, pull the appropriate product from the cooler, load it onto a work cart and push the cart on the sales floor. Some produce coolers are

large enough to accommodate fully loaded carts, reducing the amount of lifting that clerks must do. When filling displays, clerks must rotate the product so new stock is placed on the bottom and at the back of the display rack. In some large departments, clerks must spend an entire day filling product on the display racks. After displays are filled, clerks must break down empty boxes and crates and either dispose of them or prepare them for recycling by placing them in a baler.

Product reconditioning. When the produce department has been stocked, clerks recondition some of the culled product. For example, instead of discarding blemished cauliflower, they can cut it up and repackage it as cauliflower buds. Rather than discarding an entire bag of grapes because of spoilage, they can replace the bad grapes with fresh ones and rebag the entire bunch.

Throughout the day, produce clerks crisp and trim vegetables in the back room. This process involves trimming the butt end of the product, removing wilted or deteriorated portions, soaking the product for ten minutes and placing it in a crisping tote in the cooler for twenty minutes. On average, clerks spend between one and two hours each trimming and crisping vegetables. Clerks must know the crisping procedures for several different types of produce.

Food preparation. On a daily basis, when the product is in season, produce clerks (and some managers) must prepare strawberries, raspberries, blueberries, melons and pineapples. There are different procedures for preparing these fruits. For example, to prepare strawberries, clerks must cull the berries as they are removed

from the shipping containers. Next, clerks must place the strawberries back into their original containers or into new ones, insuring that the top layer of berries points up, and cover the containers with a plastic or cellophane cap. If the containers are not placed on display, they are stored in the cooler uncovered. Clerks use a machine to remove the cores of pineapples. After use, the machine must be sanitized, a process that takes about 20 minutes.

Clerks also prepare fruit cups, fruit baskets and vegetable trays. In large departments, clerks spend up to two hours preparing fruit cups. Fruit baskets are prepared on an as ordered basis. Aside from special orders, defendants sell four different types of fruit baskets, each of which takes about 20 minutes to prepare. To make a fruit basket, clerks pick and arrange the fruit according to a set pattern, shrink wrap the basket and add a bow and gift tag. On average, large departments make about ten baskets each week; small departments make about one basket a week. These numbers increase substantially during the holidays. However, fruit baskets often arrive at stores pre-made, especially during peak holiday season. Several times a week, clerks rinse, chop and arrange vegetables on a tray. On occasion, clerks also chop and package vegetables for sale.

Deliveries. In general, produce deliveries arrive in the morning. In small and medium stores, managers usually receive deliveries; in large stores, this task is performed by one or two produce clerks or a manager and a clerk. Deliveries are packaged in boxes, crates, bags or bales, all of which are known as "cases." For the most part, cases weigh between twenty and sixty pounds but a cases [sic] of watermelon can weigh up to seventy

pounds. The average weight of a case of produce is between thirty and forty pounds. Some large cases are broken down into smaller loads during cleaning, stocking and unloading. Produce cases arrive stacked on three to ten pallets, depending on the size of the store. These pallets must be unloaded with a machine known as a pallet jack. At holiday times, loads can be stacked on as many as twenty pallets.

The following table illustrates the average amount of produce delivered every week to a typical large, medium and small produce department.

	Number of Loads/ Week	Weight/ Load (lbs.)	Cases/Load
Large department	6	7,400	250
Medium department	4	6,800	190
Small department	3	6,500	195

When a delivery is received, the load must be transported into the cooler storage area using a pallet jack or "U" cart. Next, a manager or clerk must break down the load. This task involves lifting cases off the pallets and organizing these cases in the cooler according to product type and date. New product must be placed behind or underneath existing product. To do so, existing cases must be lifted and placed on top or in front of the new cases. As the load is being broken down, individual cases must be coded with a delivery date. In addition, the load must be checked against the invoice to insure that it is

complete and accurate. In the past, if an employee found a discrepancy between the invoice and the product actually received or if the product delivered was of poor quality, the produce buyer would be notified. As of April 1999, defendants discontinued this practice, except in cases of substantial discrepancies. In a large department, the receiving and unloading process takes approximately one to three hours; for a medium department, it takes one to two hours; and for a small department, it takes just one hour. In small departments and many medium departments, produce managers are responsible for receiving, unloading and stocking the produce shipments themselves. Managers also assist in receiving and stocking grocery and dairy loads. Some departments employ clerks whose primary responsibility is to receive and move produce shipments.

Customer service. Although all produce departments are self-service, produce clerks must greet customers and satisfy their requests. Nevertheless, produce clerks spend much less time on customer service than employees in the bakery and deli departments. To answer common customer questions, produce clerks must have a basic knowledge of the produce available in the store, including the following: the origin of each item of produce, how it tastes, how to prepare it, how long it will remain fresh and how to select it.

Inventory. Once every month, a full inventory is taken of the produce department. The produce manager or clerk responsible for the inventory must count all product in the backroom, the cooler and on the sales floor. Partial cases are included in this count as are estimates of bulk items.

Cleaning. Produce clerks are responsible for maintaining a clean, organized display area and a clean work area. Sinks, work tables, cutting boards and utensils must be cleaned and sanitized after use. About one-third of all display racks, which are divided into twelve-foot sections, are cleaned each non-inventory week. For cleaning, the twenty pound rack must be lifted off its base. Both the rack and the base must be thoroughly scrubbed. Because a sprinkling system is used to keep produce wet, clerks must sweep and mop the floor in the sales area several times a day. Produce clerks spend about one to one and a half hours each day cleaning the department, excluding the salad bar.

Miscellaneous. Produce clerks are asked on a regular basis to retrieve shopping carts from store parking lots. Also, they are asked frequently to help receive and stock deliveries received by the grocery and frozen food departments.

Produce managers and clerks are required to spend up to three hours a day in the produce cooler, which is maintained at 38 degrees Fahrenheit. Employees are required to spend time in the cooler for the purpose of checking inventory, writing orders, unloading deliveries, obtaining product in order to stock displays, returning excess product and storing crisped product or other products that cannot be left on the sales floor overnight.

All produce departments sell floral product. In some stores, produce clerks are responsible for making sure that water containers in the floral area are filled with water and a preservation solution. Every two or three days, containers must be emptied, cleaned and refilled

with fresh water. Also every two or three days, clerks must recut the stems of flowers under warm water and place them back into their containers. When floral product is received as part of a delivery, the plants must be watered and placed on display. Clerks are required to wrap flowers for customers according to a set procedure. In some stores, floral clerks perform these duties in place of produce clerks.

Nine produce departments feature salad bars. About once a week, either the produce manager or a trained clerk orders the salad bar product from an outside vendor. Salad bar product must be received and checked separately from warehouse shipments. Usually, salad bars contain three or four prepared salads, such as macaroni or potato salad. Each morning, a clerk must stock the salad bar, make the prepared salads according to set recipes and thaw frozen soups for placement in heated crocks located on the salad bar. This process takes about two hours. Throughout the day, clerks must replenish items on a salad bar, monitor certain temperatures and review culled product to determine whether any of it can be used in the bar. The salad bar must be broken down every evening. This process, which takes about two hours, involves cleaning and sanitizing all bowls, containers, utensils and the bar itself. Sometimes, salads for the next day will be prepared. In large departments, a clerk's main responsibility may be tending to the salad bar.

C. The Deli Department

Like produce departments, defendants' deli departments can be classified as either small, medium or large. Some of the salient characteristics of these departments are represented in the following table:

	Size of Department		
	Small	Medium	Large
Number	18	19	10
Sales/week	Less than $5,000	$5,000 - $10,000	$10,000 - $14,000
Items stocked	200 - 225	250 - 300	300

1. Responsibilities of deli employees

Many of the responsibilities of deli managers and clerks overlap. In general, deli clerks perform all tasks in the deli except for managerial duties such as ordering, hiring, employee discipline, training, scheduling and insuring that the department is prepared for government inspections. Also, deli managers are responsible for reaching sales goals and profit targets as well as controlling costs.

Customer service. Customers must obtain assistance from deli employees in order to purchase anything from the service cases and hot cases located in this department. Deli employees must be prepared to answer questions about products and fill special orders. Deli managers spend about 50 to 75% of their time responding to customers and filling orders. Clerks in small and medium departments, who have primary responsibility for cleaning and breaking down the department in the evening, devote between 30 and 50% of their time to customer service. In large departments, clerks spend about 50% of their time on customer service. Unlike managers in the produce department, deli managers must take customer service into account when scheduling shifts for their employees.

In order to remove or place product in a display case, a deli employee must squat, bend and reach for the appropriate container. Employees must do this up to 40 times each day as well as every time an employee waits on a customer or cleans the display case.

Ordering and inventory. Deli managers order all of the product stocked in the deli. Managers place orders on

the basis of current inventory, their knowledge and experience, the department's merchandising plan and records of prior orders and sales. When managers inventory their department each month, they must count each individual item. Although all deli departments order 75% of their product from a single outside vendor, a number of other outside vendors provide a significant amount of goods. Depending on the store, meat products are received two or three times a week from defendants' warehouse. Most deli managers also order from another outside vendor once a week. Delis that sell cooked chicken obtain this product from defendants' frozen foods warehouse once or twice a week. Some orders are placed over the telephone; others are placed using an ordering guide and a "Texlon" machine. Plaintiff Lang places nine orders a week from six different vendors.

Deliveries. Deli employees may spend between one to several hours a day handling deliveries and stocking product. Managers are responsible for organizing their backroom and the deli portions of the freezer. All deli departments receive deliveries at least two or three times a week. The following table illustrates the average amount of product received in these weekly deliveries at a typical large, medium and small deli department.

	Weight/Load (lbs.)	Cases/Load
Large department	3,400	300
Medium department	2,400	200
Small department	2,150	165

Cases of goods weigh from 10 pounds (potato salad) to 36 pounds (chicken). Until recently, cases of ham weighed 72 pounds; these cases are now about 36 pounds. In the

department managed by plaintiff Lang, there are times when employees lift more than one case of ham at a time. When there is a sale on ham, her department receives around 30 cases of ham a week. Lang's department receives about 25 cases of chicken a week.

In general, deli personnel do not receive their own deliveries. Deli product is usually received through the meat department or by the store receiver. On occasion, deli mangers [sic] receive their own deliveries. Deli employees do not unload their deliveries from the truck. Most product is removed from the truck by the vendor or store personnel using a pallet jack. Deli employees operate this equipment on rare occasions, if at all. Typically, product received from defendants' warehouses is transported on pallets from the truck to a cooler, freezer or holding area until a deli employee is available to retrieve it. On some occasions, a meat department employee or other store personnel will transport the order directly to the deli. Regardless who performs this task, it involves removing cases from the pallet, loading them onto a cart and pushing the cart to the deli department. The cart can be heavy and unwieldy, weighing as much as 500 pounds.

After a delivery has been received and unloaded, a deli manager or clerk must unpack the load. Because deli storage areas are smaller than produce storage areas, deli workers must unload and store many of the products carried by in their department on a piece-by-piece basis rather than in cases on a shelf. As new product is put away, a clerk or manager must date it and place it behind or underneath existing product. In the past, deli product from defendants' central kitchen arrived at stores in

steamers, which are large metal cabinets that are sometimes equipped with racks and shelves. Steamers are heavy and unwieldy. Typically, the driver would unload the steamer and push it from the receiving area to the deli cooler. Outside vendors used by the deli usually deliver their product directly to the deli cooler. Some outside vendors also stock their own product without the assistance of deli personnel.

Product inspection. Most deli products have shelf lives of several weeks. However, once these products are opened, their shelf life becomes quite short and their appearance, taste and smell must be monitored for spoilage. Prepared cold foods like sandwiches, tossed salads and pizzas must be sold within 24 to 48 hours. Prepared hot foods must be sold on the day they are prepared.

All deli products contain "sell by" dates. A product must be discarded once its "sell by" date has expired. If a product develops a poor appearance, taste or smell before this date, it can be pulled off the shelves prematurely. Clerks do not have the authority to make these decisions on their own. Some deli products can be repackaged for sale before their expiration dates. For example, if a small amount of potato salad with a May 8 "sell by" does not fill a bowl in a service case, it may be placed in a plastic container for sale until May 8. Similarly, the end of a block of cheese too small to display in the deli case may be cut up and packaged for sale.

Food preparation. Deli department employees spend far more time preparing food than produce employees. All deli employees use slicing machines to prepare meats and cheeses. Other departments have

fryers, rotisseries and broasters. Usually, preparation takes place during the day or in the evening. All stores prepare sandwiches, salads and party trays. Most delis make between seven and ten different types of salads a day, using recipes provided by defendants. Most stores also sell a variety of hot foods. Some stores cook chicken and other meats on a rotisserie. Large volume stores cook between 48 and 60 chickens a day, whereas small departments cook about six chickens. Rotisserie chickens are stored in the freezer and must be placed in the cooler for two to three days for thawing before they are suitable for cooking. A deli manager or clerk must preheat the rotisserie in the morning and begin cooking chickens by 9:00 a.m. The cooking time for chickens is approximately 90 minutes. This is one of the first tasks completed by deli employees at the start of their morning shifts. Some stores also cook chicken and other products in a "broaster." Stores offer a variety of other hot cooked foods including turkey roast, pork roast, baked ham pizza, spare ribs and soup. Some stores prepare and package cold entrees that consist of some type of meat and stuffing or potatoes. In the past, some delis have had a small restaurant area. Such departments would do more food preparation and cooking than other departments and often had clerks designated to work solely in these areas.

In large delis, particularly ones that sell hot and cold pre-made food, a manager may spend four or five hours a day on food preparation; in small delis this task may take as little as two or three hours. In delis that offer only sandwiches and salads, managers and clerks spend approximately 90 minutes a day on food preparation.

Cleaning. All deli departments must comply with state hygienic standards. Employees receive training in these standards. Deli managers are the only employees in defendants' stores required to obtain state certification in this area. On a regular basis during the day, deli employees must clean and sanitize the counters and other space used for food preparation, wipe down the slicers, wash dishes and clean the service cases. It is especially important to clean and sanitize surfaces and equipment used to prepare chicken products. The majority of cleaning done in the deli is performed at night. In some deli departments, employees mop the floor and remove trash in addition to cleaning all utensils, equipment and surfaces. Some stores assign utility clerks or other non-deli personnel to mop and remove trash. Deli employees are responsible for breaking down boxes used in their department and taking such boxes to the baler. Most clerks and managers do not operate the baler. Every evening, deli employees must wrap all of the meats and cheeses, cover the salads and entrees and empty the hot food case.

D. The Bakery Department

A large bakery department averages between $8,000 and $13,000 in sales a week; a medium-sized department averages between $5,000 and $8,000; and a small department has less than $5,000 in sales a week. Of the 47 bakery departments that existed in September 1996, 10 could be classified as large, 14 as medium and 23 as small. Currently, there are seven managers who manage both the bakery and the deli departments in a single store. These managers are assisted by three part-time

clerks in each department. Managers are responsible for reaching sales goals and profit targets as well as controlling costs.

Customer service. With few exceptions, all bakery departments are almost exclusively self-service. In the three to five departments that are full service, managers spend about 50 to 75% of their time on customer service; clerks spend between 25 to 50% of their [sic] on customer service. Customer service occupies about 20 to 30% of the time of employees who work in self-service departments.

Ordering and inventory. The bakery manager is responsible for ordering all products and supplies stocked in the department. In addition, the manager must conduct an inventory once a month. Orders are placed and received seven days a week. Pre-baked goods are ordered from an outside vendor. Frozen dough comes from defendants' warehouse. A small amount of product is ordered from other outside vendors.

Food preparation. Bakery departments bake a variety of breads, rolls and pastries on the premises. Some stores also make fried donuts. These goods are not prepared from scratch by employees in the bakery department. Instead, frozen dough is shipped to the stores from defendants' warehouse. Before being placed in the oven, this dough must be thawed, proofed (if necessary) and "finished" (*e.g.*, scored, seeded, iced, etc.). In general, dough is thawed in a refrigerator the night before it is scheduled to be baked. Depending on the type of product, the dough is allowed to rise the next morning and is finished before or after baking. The amount of goods prepared in this fashion is 35% for a large department,

30% for a medium-sized department, and only 10% for a small department. The remaining portion of goods stocked in these departments arrive at the store pre-baked. Bakery employees must learn how to gauge the amount of product to bake each day. Accuracy is important because unsold product must be discarded after two days.

Almost all bakery products must be packaged before they are sold. Pre-baked products such as rolls, cupcakes and cakes must be packaged. Breads are sliced and packaged. Bakery employees spend a significant portion of their day packaging product for sale. The department managed by plaintiff Kowalewsky decorates birthday cakes and makes strawberry pies.

In a majority of bakery departments, the manager or the clerk with the highest seniority does most of the baking.

Product stocking and inspection. Using their own judgment and following corporate merchandising plans, bakery employees arrange products in special displays. In order to carry out this responsibility, employees must be familiar with all of the products carried by their department. Also, they must know the conditions under which products must be stored. For example, meringue cannot be frozen and anything with cream always must be refrigerated.

Although most frozen bakery products can stay frozen for several months, all such products are marked with dates by which they must be baked. Given the long shelf life of these products, precision is not a high priority when they are ordered.

All fresh bakery products have a fixed shelf life. For crusty breads, donuts and self-service bulk rolls, the shelf life is one day; for packaged rolls, it is two days; and the shelf life for pies is three days. After their "sell by" dates, products must be either discarded, reduced in price or placed on a thrift rack for a day. Even before a product's shelf life has expired, employees must monitor product freshness and be able to recognize when a product has spoiled. Bakery product cannot be reworked or reconditioned past its shelf life. Some products can be repackaged. For example, if a pie has not sold after two days, it can be cut up and sold in individual pieces for one day. Repackaging decisions are made by managers. Bakery clerks and managers are responsible for pulling expired product off the sales floor, marking it down and repackaging it if necessary. They also rotate product so that the older goods are on top of the fresher ones. On a weekly basis, employees must change the price of products on the sales floor. As they perform these tasks, employees must also neaten and restock display racks. Bakery mangers [sic] and clerks spend approximately 90% of their time in the bakery department. On average, a bakery employee spends approximately one hour in the freezer and 15 to 20 minutes in the cooler.

Deliveries. Bakery employees do not unload the frozen bakery product delivered by truck to stores. Typically, the product arrives at night and is unloaded and checked in by the receiver or night clerk. This person is also responsible for separating the frozen product from the rest of the delivery, placing it on a cart and pushing the cart into the freezer. The following day, bakery employees unload the cart. Although some bakery

employees use pallet jacks on a regular basis, most use this equipment rarely, if at all.

Usually, product from outside vendors is delivered directly to the bakery department or the department's freezer. In some stores, vendors stock product that they deliver without any assistance from the bakery manager. Fresh product, which arrives every morning around 5:00 a.m. on trays loaded into steamers, must be inventoried immediately. If the count is short, a claim must be made within 24 hours. Steamers must be pushed from the store holding area to the bakery department. Often, steamers are difficult to handle because of their weight and because their wheels are not in good repair. An empty tray weighs 3 to 5 pounds; a full tray weighs 9 to 13 pounds. In order to insert or remove a tray, it is sometimes necessary to tug or pull it. Large departments receive between 10 and 15 steamers every morning; medium departments receive 5 to 10; and small departments receive 1 to 5. Depending on [sic] much other work must be done that day, it can take until noon to empty the steamers.

Large and medium bakery departments receive two deliveries of frozen bakery product a week. For a large department, each load consists of 20 to 30 cases; there are 10 to 20 cases in loads sent to medium departments. Small departments receive one delivery of about 10 to 20 cases of frozen bakery product a week. On an average week, a typical large department receives about 78 cases of frozen bakery product weighing a total of approximately 1950 pounds; a medium department receives about 62 cases weighing about 1550 pounds; and a small

department receives around 28 cases weighing approximately 700 pounds. These cases weigh between 15 and 33 pounds. In the department managed by plaintiff Kowalewsky, these cases are sometimes stored twelve feet off the ground. In order to reach cases stacked this high, employees must stand on two stacked milk crates. Employees in plaintiff Troia's department are confronted with similar physical challenges.

Cleaning. Both clerks and managers are responsible for cleaning the bakery. On a daily basis, employees must clean all of the equipment, wipe down the counters and cases, wash utensils, scrape baking trays and mop the floor. Employees must also break down cardboard boxes used by the bakery department and place these boxes in the baling machine. Bakery employees do not operate the baler. In some stores, utility clerks are responsible for taking out the trash generated by the bakery department.

E. Collective Bargaining History

Two unions represent a majority of defendants' employees. The managers and clerks in the bakery and produce departments are members of United Food and Commercial Workers Union Local 1444. With a few exceptions, the deli managers and clerks are members of UFCW Local 73A. The collective bargaining agreements that cover 1956 through 1963 include one wage schedule for "part-time male, female checker & cashier," and a separate, lower wage schedule for "part-time all other female." The agreement covering the preceding three years contains these classifications as well as a "female" schedule for women employees working more than 24

hours a week. The 1966 collective bargaining agreement sets lower hourly wages for "full-time female checkers & clerks" than "full-time male clerks." However, under the agreement, these wages equalize after three years. This agreement also contains separate wage classifications for "full-time bakery clerks" and "part-time bakery clerks & product scale clerks" that are lower than the other clerk positions. Finally, the agreement shows that as of November 1969, defendant Kohl's abandoned explicit gender-based classifications and reclassified employees into four categories: department heads; clerks and checkers; full- and part-time bakery and produce scale clerks; and bagger-carryout clerks. During the period covered by these agreements, almost all bakery clerk positions were held by women.

A "letter of understanding" attached to the 1973-1974 collective bargaining agreement contained the following provision: "The Employer hereby recognizes and agrees with the Union's position that the classification of part-time Produce Scale Clerks is limited to female employees." The agreement itself contained a classification restriction providing that the duties of part-time produce scale clerks were "limited to weighing produce, customer service, and assisting produce clerks in keeping displays neat and clean." This position no longer exists and has not existed as a separate wage classification since at least 1979.

The 1976 collective bargaining agreement provided that employees would accrue seniority within specified department classifications. Before 1976, seniority accrued on a store-wide basis.

Since 1983, the collective bargaining agreements between defendant Kohl's and the unions have classified all clerks into three categories: regular clerks, department clerks and utility clerks. The department clerk classification includes bakery clerks, deli clerks, clerks assigned to both of the bakery and the deli, floral clerks and general merchandise clerks. The regular clerk classification includes produce clerks, cashiers, liquor clerks, salad bar clerks, seafood clerks and stockers. Utility clerks bag groceries, retrieve carts, reshelve unpurchased product and perform a variety of janitorial tasks. Managers of the bakery, deli and produce departments are classified as "department heads." The gender breakdown of these positions over the past two years is illustrated in the following table:

Area	Position	1997		1998	
		Female	Male	Female	Male
Produce	Manager	3	45	3	44
	Full-time clerk	7	28	7	28
	Part-time clerk	30	83	22	77
Deli	Manager	38	0	32	0
	Full-time clerk	31	1	31	2
	Part-time clerk	170	16	149	21
Bakery	Manager	37	0	34	0
	Full-time	11	0	13	1
	Part-time	132	5	133	5
Bakery/ Deli	Manager	11	1	12	0

Defendant Kohl's collective bargaining agreements show that since the 1970s, with one brief exception, it has paid produce managers and clerks more than bakery and deli managers and clerks. For example, the 1973 collective bargaining agreement provides that in February of that year, produce managers earned $5.23 an hour compared to $4.15 an hour for bakery managers. Produce clerks with 24 months of service received $2.83 an hour in February 1973 while the hourly wage for bakery clerks with the same experience was just $2.43.

In the 1992, 1995 and 1998 collective bargaining negotiations, UFCW Locals 1444 and 73A proposed equalizing the pay of produce, bakery and deli clerks. In 1998, UFCW Local 73A proposed equalizing the pay of deli and produce managers. At each negotiating session, defendants opposed these proposals.

Since October 1992, the hourly wage of produce managers increased by a smaller percentage than the wage for their counterparts in the bakery and deli departments – 14.9% compared to 16.4% and 15.5%. However, the $1.15 gap between these groups remained. In 1992, produce managers received a $1.75 an hour increase while bakery and deli managers received a $1.15 an hour raise. Managers of all three departments received a $.90 an hour raise in 1995 and a $.95 an hour increase in 1998.

Since October 1992, department clerks have received greater percentage wage increases than regular clerks. For example, department clerks at the ninth pay level received a 14.3% increase compared to a 9.9% raise for regular clerks. In 1992, the wage for department clerks went up by $.30 an hour compared to a raise of $.45 an

hour for regular clerks. After another raise in 1995, the gap closed to just $.05 an hour for this pay level.

During the 1995 negotiations, defendants obtained and relied on collective bargaining agreements from some of its competitors. Like defendants, Woodman's Food Markets and Schulz Sav-O Stores classify their produce clerks as "regular clerks" and their bakery and deli clerks as "department clerks." Also like defendants, these stores pay regular clerks more than department clerks. Woodman's, Schultz's, Sentry, Supersaver and Cub Foods pay their produce managers more than their bakery and deli managers. Clerks who work for defendants have higher rates of pay than clerks who work for defendants' competitors, with the exception of Sentry and Woodman's. Even Cub Foods, which has one classification for all of its clerks, pays its deli and bakery employees less than defendants do.

Shortly after the bargaining sessions for the 1995 agreement ended, one of the unions asked defendants to justify the wage disparity between produce employees and employees in the bakery and deli departments. In response, defendants' personnel director, Daniel Daley, explained that the disparity had to be maintained for competitive reasons. Neither Daley nor defendants had ever attributed the disparity to this rationale in prior bargaining sessions. Daley had not discussed this matter with any other member of defendants' bargaining team during the 1995 negotiations.

F. Sales and Profitability

For fiscal years 1994 through 1998, the annual sales of all produce departments were: a) more than twice the annual sales of all bakery departments; b) more than twice the annual sales of all deli departments; and c) more than all bakery and deli sales combined. For these same years, the company-wide "D-rate" of the produce department was greater than the rates for the bakery and deli departments. ("D-rate" is the percentage comparison of a department's sales to the total sales of the entire store. The higher a department's D-rate, the more sales it contributes to its store and the corporation.) Yield reports are generated every four weeks. Yield is a measure of a department's profitability. Since 1992, the company-wide yield for produce has surpassed the yield for bakery and deli by a wide margin. At the end of fiscal years 1997 and 1998, 11 deli departments and 9 bakery departments (out of 47) had negative yields. During these years, no produce department had a negative yield.

All clerks and managers in the produce, bakery and deli departments are paid according to the collective bargaining agreement, not according to the size of the department in which they work. Thus, the manager in defendants' largest, most profitable produce department receives no higher hourly rate than the person who manages defendants' smallest produce department. Similarly, grocery department sales usually exceed produce department sales but employees of both departments are paid the same. Finally, under the collective bargaining agreement, seafood clerks earn more than bakery and deli clerks, even though the seafood department generates lower revenues than the bakery and deli departments.

G. Employment Manuals

1. Trainee guides

Defendants have prepared "trainee guides" for employees participating in its "comanager development program." There are separate guides for the bakery, produce and deli departments. The purpose of these guides is to "outline the areas of the Department that a [comanager trainee] should concentrate on and master." Each guide lists a number of specific activities including "ordering merchandise," "making price changes," and "taking inventory." These activities describe the duties of employees in the bakery, deli and produce departments and are broken down into over 90 "specific competencies." As a bakery manager, plaintiff Kowalewsky performs many but not all of the 96 specific competencies listed for produce managers. For example, she orders, receives, prices and marks merchandise on a daily basis as well as makes price changes weekly. Of the twenty-five activities contained in the produce trainee guide, all but four are also listed in the deli and bakery guides: maintaining product freshness, packaging products, rotating products and maintaining the salad bar. Despite this discrepancy, deli and bakery employees are responsible for maintaining product freshness, packaging product and rotating products.

2. Interviewing and selection guide

In its "Store Interviewing and Selection Guide," defendants divide entry level jobs into three "position profiles": service department clerks; front-end clerks; and

general clerks. According to the guide: "The purpose of a Position Profile is to help: Ensure that questions asked during the interview relate directly to the job; Serve as a review of the skills necessary to perform the available job; Develop probing questions to match the applicant's prior experiences with the available job." Positions classified within the service department category include bakery, deli, floral, meat, seafood and produce clerks.

3. "Essential functions" charts

A document created by defendants spells out the "essential functions" of the "A&P deli and bakery clerk position;" a similar document addresses "the A&P produce clerk position." Each document contains four headings: environment; handling product; technical/psychological requirements; and other requirements. There are some similarities among the functions listed in these documents, particularly under the first two categories.

4. "Ergonomic Job Description" reports

Defendants' "Ergonomic Job Description" reports describe the general physical requirements for produce, bakery and deli jobs. In each document, under the heading "physical demands analysis," a table indicates that employees in all three positions are expected to lift objects weighing between 0 and 50 pounds on an hourly basis with an average weight of 30 pounds. Whereas produce clerks must lift 51- to 75-pound objects on a

daily basis, bakery and deli clerks are expected to do so once every week.

H. Hiring

According to store manager Robert Rosemeyer, in terms of education and experience, the requirements for bakery, deli and produce clerks are the same. The most important factor is availability. In addition, managers also consider whether an applicant has preferenced a particular department or position.

OPINION

I. EQUAL PAY ACT

The Equal Pay Act prohibits employers from paying employees of one sex more than employees of the opposite sex "for equal work on jobs . . . which require equal skill, effort, and responsibility, and which are performed under similar working conditions. . . . " 29 U.S.C. § 206(d). From this language, courts have extrapolated a three-part standard that a plaintiff must satisfy in order to meet her prima facie burden of proving a violation of the act: 1) the employer pays higher wages to employees of the opposite sex; 2) the employees do work that requires equal skill, effort and responsibility; and 3) the employees have similar working conditions. *See Fallon v. State of Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989). If the plaintiff makes this prima facie showing, "the burden of proof (persuasion) shifts to the defendant to prove that the wage disparity is attributable to one of the Act's four affirmative defenses." *Id.* at 1213 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). These defenses

include a system based on seniority merit or production or "any other factor other than sex." § 206(d).

A. Wage Disparity

Defendants contend that there are two reasons why plaintiffs are unable to clear the first hurdle of a prima facie case. The first goes to the wage classifications set by the collective bargaining agreements. Under these agreements, produce clerks are classified as regular clerks whereas bakery and deli clerks are classified as department clerks. Defendants assert that because the "regular clerk" classification includes cashiers, a majority of whom are female, there is no gender-based wage differential between wage classifications. Second, defendants argue that plaintiffs cannot establish a prima facie case of wage discrimination because there are female produce employees who are paid the same as their male counterparts. These arguments are meritless. Both appear to be directed at proving that defendants have not had the subjective intent to discriminate against plaintiffs. The assertion runs as follows: most department clerks are women and not all regular clerks are male; *a fortiori*, defendants' wages are not the product of deliberate discrimination. The problem with this rationale is simple; unlike Title VII, an Equal Pay Act claim does not require proof of discriminatory intent. *See Fallon*, 882 F.2d at 1213. To satisfy the first element of a prima facie case under the Equal Pay Act, a plaintiff need show only that "different wages are paid to employees of the opposite sex." *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1461 (7th Cir. 1994). This requirement is met when an individual female plaintiff identifies a single male employee who

is paid more for equal work. *See Equal Employment Opportunity Commission v. White and Son Enterprises*, 881 F.2d 1006, 1009 (11th Cir. 1989). The employer may call the court's attention to other employees who perform substantially equal work and who have been improperly excluded by the plaintiff. *See id.* It is not necessary for a plaintiff to compare her job with every other job in a particular pay classification, especially when the other jobs are manifestly unequal in skill, effort and responsibility, as is the case with cashiers and produce clerks.

B. Equal Work

1. Expert reports

Both parties have submitted expert reports addressing the threshold issue whether the positions in question are "equal" within the meaning of the act. For a variety of reasons, neither report will be considered for the purpose of considering the pending motions.

Defendants' report is written by someone named Dr. David Jones of Aon Consulting. It is neither signed nor supported by an affidavit. Instead, it is attached to a brief. Jones's credentials and qualifications as an expert are a total mystery. Does he hold a doctorate in social sciences, economics or podiatry? The court has no way of knowing. There is yet another problem with this report. Defendants waited to submit it as an attachment to a reply brief, depriving plaintiffs of any opportunity to test its validity.

Plaintiffs' report fares no better. It was written by Howard Risher, a private consultant and adjunct professor of business at the University of Pennsylvania. Like

the Jones report, Risher's report is not properly authenticated. Plaintiffs submitted it in a collection of bound exhibits accompanying their proposed findings of facts. None of the exhibits within this volume is supported by an affidavit attesting that is a true and correct copy of what it purports to be. The report is also inadmissible under the standards applicable to expert witnesses. It is well settled that affidavits of expert witnesses cannot contain mere conclusory statements of the expert's ultimate opinions; the affidavits must reveal "a process of reasoning beginning with a firm foundation." *See Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1338-39 (7th Cir. 1989). Risher's report flunks both parts of this standard. He does not begin with a firm evidentiary foundation. Risher explains that his conclusions are based on a variety of documentary evidence submitted by the parties, including the various employment manuals discussed in subsection 'G' of the facts section of this opinion. He reviewed only five of the numerous depositions provided by Kohl's employees. Even worse, Risher did not observe employees perform the jobs that he has evaluated and he has not represented that it is accepted practice to conduct these types of studies without the benefit of firsthand observation. Particularly in light of the act's emphasis on job content over descriptions and titles, it is questionable what weight, if any, can be given to such an opinion. The contents of the report do little to allay this skepticism. To be sure, in the section covering the clerk positions, there are six enumerated reasons supporting Risher's conclusions but no *process* of reasoning or analysis that even comes close to explaining how he arrived at these conclusions. For example, Risher begins

by noting that there are ten "basic duties common to all clerks, regardless of department." After listing these duties, all of which appear to come from defendant's employment manuals, Risher states as a second reason that "the clerk classification in each department is an entry-level position" requiring "no prior experience or job training." The remaining four reasons are equally brief and equally unenlightening. Indeed, they are nothing more than observations that have been made by many lay witnesses associated with this case.

2. Merits

The Equal Employment Opportunity Commission, the agency charged with administering the Equal Pay Act, has promulgated regulations providing that the terms skill, effort and responsibility "constitute separate tests, each of which must be met in order for the equal pay standard to apply." 29 C.F.R. § 1620.14(a). The court of appeals has cited this regulation with approval. *See Stopka v. Alliance of American Insurers*, 141 F.3d 681, 686 (7th Cir. 1998). On other occasions, the court of appeals has forgone undertaking separate skill, effort and responsibility inquiries in favor of a more open-ended, two-part test. First, the court asks whether the jobs in question share "a common core of tasks." *Dey*, 28 F.3d at 1461. If so, the employer must "'show that the higher-paid employee was assigned additional tasks that made his job 'substantially different.' " *Id.* (quoting *Fallon*, 882 F.2d at 1209). Regardless which test is applied, courts should be guided by job content, not titles or descriptions. *See Dey*,

28 F.3d at 1461; *Equal Opportunity Employment Commission v. Sears, Roebuck & Co.*, 839 F.2d 302, 346 (7th Cir. 1988).

According to defendants, even if bakery, deli and produce employees all perform tasks that are the same on some superficial level, the content of these tasks differs substantially from position to position. Defendants characterize any effort to equate these tasks with another as an endorsement of a discredited theory of wage discrimination known as comparable worth. To illustrate how plaintiffs have resorted to a comparable worth theory, defendants contend that plaintiffs' brief "is peppered with references to comparability." Defs.' Rep. Br., Dkt. #210, at 5. As an example, defendants cite plaintiffs' assertion that food preparation in the produce department is no more complex than food preparation in the deli department. Defendants' argument appears to be based on two related positions. First, the act does not apply to two jobs if there is any difference in the content of these jobs, however slight. To use defendants' example, two positions that each involved food preparation would be merely comparable, as opposed to substantially equal, if an employee in one position baked frozen dough while an employee occupying the other position chopped vegetables for a salad bar. Similarly, even though deli, bakery and produce employees are all responsible for stocking product in their respective sales areas, these jobs would also be outside the act because they involve different products. Second, any effort to compare jobs that are dissimilar in some way amounts to a comparable worth analysis. Defendants are wrong on both counts.

The act does not demand that the work performed by a plaintiff and her higher-paid male co-workers be

identical; "it is sufficient if the duties are 'substantially equal.' " *Fallon*, 882 F.2d at 1208 (quoting *Epstein v. Secretary, United States Department of the Treasury*, 739 F.2d 274, 277 (7th Cir. 1984)). For example, it is well established that the performance of jobs on different machines or equipment does not necessarily mean that such jobs are unequal within the meaning of the act. *See* 29 C.F.R. § 1620.14(c); *Thompson v. Sawyer*, 678 F.2d 257, 273-74 (D.C. Cir. 1982). The regulations extend this proposition to retail establishments:

> the fact that jobs are performed in different departments or locations within the establishment would not necessarily be sufficient to demonstrate that unequal work is involved where the equal pay standard otherwise applies. This is particularly true in the case of retail establishments, and unless a showing can be made by the employer that the sale of one article requires such a higher degree of skill or effort than the sale of another article as to render the equal pay standard inapplicable, it will be assumed that the salesmen and saleswomen concerned are performing equal work.

29 C.F.R. § 1620.14(c). By allowing for some comparisons between different jobs, the act acknowledges that few jobs are indistinguishable and that it is difficult, if not impossible, for a court to decide whether two jobs are "equal" without comparing job characteristics that are dissimilar in some way, shape or form. When making these comparisons, courts must "steer a narrow course" "between 'very much alike, which is within the scope of the Act, and 'comparable,' which is outside; for it is plain that Congress did not want to enact comparable worth as

part of the Equal Pay Act of 1964." *Equal Employment Opportunity Commission v. Madison Community Unit School District*, 818 F.2d 577, 582 (7th Cir. 1987).

Comparable worth is "a shorthand expression for the movement to raise the ratio of wages in traditionally women's jobs to wages in traditionally men's jobs." *American Nurses' Association v. State of Illinois*, 783 F.2d 716, 719 (7th Cir. 1986). It presupposes "that jobs of equivalent 'worth' or value to an employer or to society as a whole should be compensated equally even if the jobs are dissimilar in content." Daniel R. Fischel and Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 83 University of Chicago Law Review 891, 891 (1986). As explained by the Court of Appeals for the Seventh Circuit, there are two major premises underlying this theory: 1) "a society politically and culturally dominated by men steered women into certain jobs and kept the wages in those jobs below what the jobs were worth, precisely because most of the holders were women;" and 2) "analytical techniques exist for determining the relative worth of jobs that involve different levels of skill, effort, risk, responsibility, etc." *American Nurses' Association*, 783 F.2d at 719. The second premise assumes that "the comparability of different jobs can be measured or evaluated apart from the values assigned in the marketplace." Fischel and Lazear, 83 University of Chicago Law Review at 893. Comparable worth is not a viable theory of wage discrimination in suits brought under the Equal Pay Act or Title VII. *See Madison Community School District*, 818 F.2d at 582; *American Nurses' Association*, 783 F.2d at 720.

The food preparation example highlighted by defendants is the type of analysis contemplated by the Equal Pay Act. Plaintiffs have not attempted to assign an objective, economic value to the clerk positions; they have identified a common task performed by employees in all departments – food preparation – and inquired whether two of the three operative job characteristics identified in the act – skill and effort – vary significantly among the departments. A comparable worth analysis would *begin* with the notion that substantial differences do exist and then ask, notwithstanding these differences, whether the bakery, deli and produce positions are worth the same to society or defendants. *See Madison Community School District*, 818 F.2d at 580 (after defining comparable worth and noting that theory is not compatible with Equal Pay Act, court explains by way of example that "[a] female *secretary* paid less than a male *janitor* cannot complain under the [act] that the disparity in their wages is not justified by 'objective' factors such as differences in skill, effort and responsibility") (emphasis added).

With the conclusion that job comparison is both appropriate and necessary, the question becomes what to compare. During the time period encompassed by this lawsuit, defendants operated 47 Kohl's Food Stores in Wisconsin. The deli, bakery and produce departments in these stores differ from one another in significant respects. Depending on the store, each department does a different volume of business, stocks a different number of items, receives different quantities of these items, employs a different number of people and uses its employees in different ways. As a result, it is difficult to pin down the job requirements of specific positions

because these requirements tend to vary in significant respects not only from department to department but even among employees holding the same job title in the same department.

The way in which produce departments handle deliveries is an apt example of job variations that exist within the same department as well as the way in which this phenomenon makes application of the equal work standard so difficult. Defendants argue that produce jobs require greater effort than bakery and deli jobs because most produce departments receive more product packed in heavier cases each week than most bakery and deli departments. However, each produce department appears to have a different system for receiving, unloading, stocking and managing its inventory. In some departments, managers have sole responsibility for handling deliveries; in other departments, this task is performed by both clerks and managers; still other departments have clerks who are assigned on a full-time basis to receiving deliveries. It is unclear whether employees occupy these positions on a permanent or a rotating basis. There is also no indication how much heavy lifting must be done by employees who are not in these rotations, such as those assigned exclusively to the salad bar. Under this view of the facts, *some* produce employees exert significantly more effort than bakery and deli employees.

Variations among departments from different stores, as opposed to departments within the same store or department, complicate the process of determining whether plaintiffs can satisfy the equal work standard. Both parties make arguments that are based on the

assumption that the 47 Kohl's Food Stores operated by defendants during the time covered by this lawsuit should be treated as a single store. Despite this outward similarity, the comparisons drawn by the parties differ from one another profoundly. These comparisons surface in the context of manager responsibility, among other areas. Defendants assert that the produce manager position requires greater responsibility than the positions of bakery and deli manager because the combined sales volume and profitability of all produce departments far outstrip these totals for bakery and deli departments. According to defendants, "The Court need not look any further than the financial responsibility factor to dispose of the claims of the bakery and deli managers." Dkt. #210 at 6. In response, plaintiffs maintain that defendants cannot prevail on this argument unless they are able to "show that the duties of a produce manager in a store with produce revenues of $3,000 a week are materially different than the duties of [a] bakery and produce manager in a department that generates revenues of $10,000 a week." Pls.' Br. in Opp., Dkt. # 195, at 16. In a footnote, defendants acknowledge the factual proposition behind plaintiffs' point but insist that the proper basis of comparison is the entire 47-store enterprise, not individual departments: "Certainly there is considerable variation from store to store, and it is even possible that a deli department in a large store could have sales that exceed a produce department in a small store. However, since company-wide wage rates are collectively bargained with unions, only the company-wide figures are relevant." Defs.' Br. in Supp., dkt. #177, at 9.

The parties develop similar comparisons based on the way in which the size of a department can influence the amount of skill, effort and responsibility required to perform a job. In each case, these comparisons are patterned after the parties' arguments on manager responsibility. Defendants rely on average and aggregate values, a strategy that exploits the fact that in every store produce departments are larger, generate more profit and sales, move more product and have more employees than the bakery and deli departments in the same store. For their part, plaintiffs operate at both ends of the spectrum. The legal principle underlying plaintiffs' arguments is as follows: the equal work standard is satisfied so long as the job of one deli or bakery employee at one of defendants' stores is equal to or more difficult than the job of one produce employee in another store. In a variation on this argument, plaintiffs argue that if there is correlation between a factor such as effort and the amount of product received or sold by a given department on an average week, the standard is satisfied so long as a bakery or deli department from one of the larger stores outranks one produce department from one of the smaller stores in this area.

The appropriate standard for structuring these multifaceted comparisons should be consistent with the equal work standard itself, which dictates that two jobs are equal if they share a "common core." This precludes the type of arguments favored by plaintiffs that rely on outliers (i.e., comparing the deli employee responsible for handling the largest volume of product with the produce employee responsible for handling the least). In *Thompson v. Sawyer*, 678 F.2d 257, 273-74 (D.C. Cir. 1982), the Court

of Appeals for the District of Columbia rejected an attempt by an employer to draw similar comparisons. *Thompson* involved an Equal Pay Act claim brought a group of predominantly female "bindery workers" who contended that their employer, the Government Printing Office, paid them less than predominantly male "bookbinders" even though both positions required substantially the same skill, effort and responsibility. The court concluded that, as a general matter, two positions can be equal within the meaning of the act even though employees who hold these positions work on different machines. As always, the court noted, the controlling factors are skill, effort and responsibility. *See id.* at 274. The employer argued that the jobs in question were unequal because some of the male bookbinders operated machines that required handling 100-pound bolts of cloth. The court rejected this argument, stating:

> To prove a violation under the Equal Pay Act, plaintiffs need only show their jobs were equal to the jobs of some bookbinders, but treated unequally. Plaintiffs need not show that their jobs were substantially similar to all, or even most bookbinder jobs. . . . [I]t is irrelevant that GPO classifies the bookbinder jobs that resemble plaintiffs' together with other jobs that do not.

Id. at 275 (citations omitted). By definition, bakery, deli and produce jobs that lie on the outmost fringes of the skill, effort and responsibility spectra do not represent the core of these jobs. A fair comparison must be based on a representative sample of the employees who hold clerk and manager positions in the various deli, bakery and produce departments operated by defendants.

With these principles in mind, I conclude that there is a genuine issue of fact whether bakery, deli and produce clerks share a common core of tasks. The job descriptions provided in defendants' training manuals and selection guides are by no means dispositive of this issue although they are of some probative value, particularly given that they were written by defendants. *See Marshall v. Building Maintenance Corp.*, 587 F.2d 567, 570-71 (2d Cir. 1978); *Brennan v. Owensboro-Daviess County Hospital*, 523 F.2d 1013, 1017 (6th Cir. 1975). These documents reveal that with few exceptions the duties that must be performed by clerks in all three departments fall under the same broad categories. For example, all bakery, deli and produce clerks are expected to clean their work areas, inspect existing product, stock fresh product, remove and recondition unsaleable product, answer customer questions and prepare food. To be sure, differences in the content of these tasks raise questions whether they are substantially equal. However, these questions are better suited to resolution by a jury. Viewing the undisputed facts in a light most favorable to plaintiffs, I cannot say definitively whether, for example, the preparation of rotisserie chickens or dinner rolls is substantially equal to the preparation of vegetable trays or fruit baskets. Like many other distinctions drawn by defendants, the problem with this one is that it does not appear to be anchored firmly in one of the three factors that justify a wage disparity under the equal work standard: skill, effort and responsibility. If anything, it resembles the type of "overly nice distinction[ ] in job content" that courts should refrain from drawing lest employers "evade the Act at will." *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 285

(4th Cir. 1974). To cite another example, defendants assert that produce clerks are more highly skilled than either deli or bakery clerks because of the specialized knowledge required for identifying produce items, recognizing whether they are fresh and knowing how they should be stored. *See, e.g.*, dkt. # 177 at 24 (whereas some produce departments stock as many as 15 different kinds of apples and 8 varieties of grapes, bakery and delis stock fewer items, most of which are readily identifiable or are prepackaged with identification labels) and at 25 (whereas produce clerks must know, for example, that apples must be stored in the cooler, tomatoes cannot be stored in the cooler and California white potatoes must not be exposed to too much light, bakery and deli clerks need know only whether product "should be stored in the cooler or freezer, or placed on the shelf for sale.") Although there is some logic to this argument, I question whether it amounts to anything more than the simple observation that different departments carry different items.

I have similar misgivings about the way in which defendants distinguish the job content of manager. For example, it is true that because of the perishable nature of their product, produce managers may use more skill when minimizing shrink and in placing orders. However, bakeries and delis also sell perishable foods that place many of the same demands on the employees who manage these departments. These individuals must remove product that has become stale, sour or moldy, developed a foul smell or taken on some other unappealing characteristic. It is possible that the "sell by" dates on many bakery and deli products make these tasks significantly less onerous or less skilled compared to produce. But as

plaintiffs have observed, once a deli product has been opened, it must be monitored just as closely as a crate of strawberries, if not more so. Even though bakery and deli products cannot be sold under any circumstances after their "sell by" date, managers are expected to recondition product when necessary before this date has been reached.

Whether the produce, deli and bakery positions require substantially the same effort is a closer question. As already discussed, it is unclear how evenly the responsibility for lifting and moving cases of product is distributed among produce employees. From the undisputed facts established by the parties, it appears likely that a small number of produce employees bear the brunt of the heavy lifting in their department. If so, these employees are not a representative sample of all produce employees.

Whether the manager jobs are substantially equal in responsibility represents yet another close question. Defendants are correct that a correlation has been recognized between revenue production and managerial responsibility. *See Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1364 (10th Cir. 1997) (substantial difference of revenue between plaintiffs department and departments managed by male employees reflected difference "in the level of experience required to adequately manage operations and the level of complexity in performing required functions"); *Stanley v. University of Southern California*, 13 F.3d 1313, 1322 (9th Cir. 1994) ("The responsibility to produce a large amount of revenue is evidence of a substantial difference in responsibility.") Even though there is no dispute that produce departments generate between two

to two and a half times the revenue produced by bakery and deli departments, it is difficult to say how much weight should be attributed to revenue production alone. In the cases relied on by defendants, the courts considered a number of factors in reaching their conclusions that the jobs in question were unequal. *See Sprague*, 129 F.3d at 1364 (noting, among other reasons, different level of experience between plaintiff and male co-workers); *Stanley*, 13 F.3d at 1321-22 (compared to coach of women's basketball team, coach of men's team had specialized training and professional experience in marketing, had more years of coaching experience, had worked for university longer and was published author). Perhaps more important, the disparity in revenue production at issue in these cases was much more dramatic. *See Sprague*, 129 F.3d at 1364 ("Sprague worked in a department which produced less than one-tenth of the revenues of the departments managed by the male assistant managers"); *Stanley*, 13 F.3d at 1365 (men's team generated 90 times the revenue of women's team).

In addition to showing at this stage that there is a genuine dispute whether the bakery, deli and produce positions share a common core of tasks, plaintiffs must also establish that produce clerks and managers are not assigned additional work that makes their job substantially different. *See Dey*, 28 F.3d at 1461. According to defendants, plaintiffs cannot make this showing because bakery and deli employees devote most of their time to customer service whereas produce positions are oriented just as strongly toward other tasks like stocking, ordering, culling and reconditioning product. The operative distinction is not whether an employee devotes more of

his work day to a given task than a female co-worker; by itself, this proves nothing. Instead, defendants must show: 1) produce clerk jobs involve tasks not performed by bakery and deli clerks; 2) the extra tasks require greater skill, effort or responsibility; and 3) produce clerks devote a significant amount of time to these extra tasks. *See Equal Employment Opportunity Commission v. Kenosha Unified School District No. 1*, 620 F.2d 1220, 1225 (7th Cir. 1980). With respect to the manager positions, defendants' argument goes no further than emphasizing the different amount of time that bakery, deli and produce managers spend performing the same tasks.

The notion that produce clerks spend a significant amount of time performing tasks that are not assigned to bakery and deli clerks is more intriguing but ultimately unpersuasive. There is no dispute that all clerks devote some of their time to stocking product and to customer service. Culling is a slightly different matter, however. Like produce departments, bakeries and delis sell perishable foods that must be monitored for freshness. Although bakery and deli clerks have some role in this process, they do not have the authority to discard, recondition or reduce the price of product no longer fit to remain on the shelves. By contrast, produce clerks discard unsaleable product as a part of the daily culling process. Relying on this distinction, defendants argue that produce clerks have greater responsibility because their ability to make these decision's accurately and without the assistance of "sell by" dates has an impact on their department's "shrink" and profitability. As an abstract matter, I agree that this is the type of extra duty that could tip the scales for defendants. *See* 29 C.F.R.

§ 1620.17(b)(2) (male sales clerk with authority to determine whether to accept personal check from customer "may have a considerable, additional degree of responsibility [than female clerk who does not possess similar authority] which may materially affect the business operations of the employer.") Nevertheless, I am reluctant to ascribe much significance to this responsibility without some indication of how much product is disposed of in this fashion. From the facts, it appears that only managers are allowed to make decisions with potentially large financial repercussions, such as marking down or throwing away a large quantity of goods at once. Perhaps individual culling decisions made by produce clerks have the same effect collectively. This remains to be proven.

C. Working Conditions

Along with showing that jobs are equal in skill, effort and responsibility, a plaintiff must show that jobs are performed under similar working conditions in order to satisfy the third and final component of a prima facie case under the Equal Pay Act. The regulations emphasize that the standard is flexible and will be met ordinarily if jobs are equal in skill, effort and responsibility. *See* 29 C.F.R. §§ 1620.18(a) and (b). The question is whether the differences in conditions "are the kind customarily taken into consideration in setting wage levels." *Id.* Two factors that play into this analysis are workplace surroundings and hazards. *See id.* Focusing on surroundings, defendants maintain that produce, bakery and deli clerks are not performing under similar working conditions because produce clerks and managers are required to spend a

significant amount of time each day in the cooler – sometimes as much as three hours, depending on the store and the day. By comparison, deli and bakery clerks log no more than an hour each day in their department's cooler. When the facts are viewed in a light most favorable to plaintiffs, two additional hours in a refrigerated environment over the course of an eight-hour shift might represent the kind of sustained intensity that would justify a wage differential, but I cannot say that it would as a matter of law. *See id.* (" 'surroundings' measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and their frequency.")

D. Factors "Other than Sex"

Defendants contend that they are entitled to summary judgment even if there is a genuine dispute whether plaintiffs have made out a prima facie case of wage discrimination because the disparity in pay is based on a factor other than sex. Specifically, defendants argue that the disparity can be explained by: 1) the higher revenue and profitability of produce departments; 2) the greater skill, effort and responsibility associated with the produce clerk positions; and 3) the collective bargaining agreements. As already explained, defendants bear the burden of persuasion with respect to these affirmative defenses. *See Fallon*, 882 F.2d at 1213.

I have already found that there is a genuine dispute with respect to the first reason. Similarly, in an opinion and order on notification of the Equal Pay Act class, I observed that the regulations prohibit an employer from

arguing that unequal wages are the product of a collective bargaining agreement and declined to follow two district court opinions that rejected this rule. *See* dkt. #29 at 4. Defendants have cited no new authority. Finally, because there is a genuine dispute of fact whether produce, deli and bakery jobs are substantially equal, defendants' third affirmative defense must be rejected.

II. TITLE VII

Liability under the Equal Pay Act does not lead automatically to liability under Title VII. *See Fallon*, 882 F.2d at 1218. Unlike a wage discrimination claim brought under the Equal Pay Act, Title VII requires proof of discriminatory intent. *See id.*, 882 F.2d at 1213. This intent "must encompass an actual desire to pay women less then men because they are women." *Loyd v. Philips Bros., Inc.*, 25 F.3d 518, 525 (7th Cir. 1994). In addition, the burden of proof never shifts from the plaintiff to the defendant in a Title VII action, whereas in an Equal Pay Act case, "the risk of nonpersuasion rests with the employer on the ultimate issue of liability." *Fallon*, 882 F.2d at 1213. As in all Title VII cases, discriminatory intent can be established by direct evidence or by use of the *McDonnell Douglas* burden shifting analysis. *Cf. Loyd*, 25 F.3d at 525 n.6 (burden shifting approach not well suited to wage discrimination claims involving dissimilar jobs).

Defendants are correct that plaintiffs have produced no direct evidence of discriminatory intent. In an employment discrimination case, there are two hallmarks of direct evidence: 1) the evidence must prove a fact without reliance on inference or presumption; and 2) it must

relate to the specific employment decision in question. *See Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438 (7th Cir. 1997). Nothing characterized by plaintiffs as direct evidence comes close to satisfying this standard. For example, the gender-based wage classification scheme from the old collective bargaining agreements may have been direct evidence of discrimination when these agreements were in force three and four decades ago but the current system cannot be so characterized. To conclude otherwise would require drawing an inference that the non-gender specific titles in place today are a subterfuge for defendants' desire to pay women less and that this desire does not extend to female employees in the higher-paid produce and cashier categories.

The gender breakdown of the various departments does not amount to direct evidence. Contrary to plaintiffs' assertion, defendants' workforce is not "shockingly segregated." Dkt. #195 at 28. In 1998, approximately 20% of part-time and full-time produce clerks were women. Even if positions and departments were divided completely along gender lines, such evidence is at most "probative" of wage discrimination; it does not "*compel* a finding that this sex-segregation was motivated by wage (as opposed to social, physical, sexual or other, though not laudable, non-wage related) considerations." *Loyd*, 25 F.3d at 525. This logic applies with equal force to the other examples of direct evidence identified by plaintiffs: the adoption of departmental seniority and the provision in the 1983 collective bargaining agreement allowing utility clerks, most of whom were male, to bid first for regular clerk positions. By themselves, these facts would *support* a finding of wage discrimination but they do not

compel such a finding because they do not rule out other explanations that have no relation to gender.

With no direct evidence of wage discrimination, plaintiffs must satisfy the indirect, burden-shifting method of proof established by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). In the context of a Title VII wage discrimination claim, a prima facie case consists of meeting the Equal Pay Act's equal work standard. *See Sears*, 839 F.2d at 344. Because there is a genuine dispute whether the clerk and manager positions are substantially equal in skill, effort and responsibility, defendants must articulate a legitimate, non-discriminatory reason for the pay disparity if they are to prevail on their motion for summary judgment with respect to the Title VII claims.

The three reasons offered by defendant are nearly identical to the affirmative defenses raised in response to plaintiffs' Equal Pay Act claim: 1) produce departments contribute more to defendants' revenue and profit than bakery and deli departments; 2) produce jobs require greater physical effort, more responsibility and movement of more product than the bakery and deli departments; and 3) market forces have not required defendants to close the gap between produce wages and deli and bakery wages. *See* Defs. Prop. Findings of Fact in Supp. of Mot. for Summ. J. on Pls.' Class Claims, Dkt. #178, at ¶ 205. Plaintiffs contend that these reasons are a mere pretext for wage discrimination.

Plaintiffs try to make this showing by focusing primarily on when defendants' personnel director, Daniel

Daley, articulated these reasons and to whom. In particular, plaintiffs emphasize that Daley never mentioned the three reasons until shortly after negotiations for the 1995 collective bargaining agreement had ended and that defendants had never invoked this rationale to justify the disparity during the negotiation of prior agreements. Moreover, Daley never discussed any of these reasons with other members of defendants' bargaining team and, when pressed by the union on the issue, he referred only to the prohibitive cost of equalizing wages and the practice of Kohl's competitors. Daley did not offer the other two justifications until sometime after the commencement of this lawsuit. In addition to attacking Daley's credibility, plaintiffs challenge whether produce jobs are equal to deli and bakery jobs, question whether any correlation exists between department revenue and wages and point out that at least one of defendants' competitors pays its bakery, deli and produce clerks the same wage.

I agree with defendants that plaintiffs' arguments do not establish that defendants' legitimate, nondiscriminatory reasons are pretextual. Pretext is a "phony reason" offered by the employer for engaging in discriminatory conduct, *see Mills v. First Federal Savings & Loan Ass'n*, 83 F.3d 833, 845 (7th Cir. 1996), that may be proven either directly or indirectly "by presenting evidence that the employer's proffered reason is unworthy of credence, thus raising the inference that the real reason is discriminatory." *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997). The question is always whether the *employer* honestly believed its proffered reason. *See Kralman v. Illinois Dept. of Veterans' Affairs*, 23 F.3d 150, 156 (7th Cir. 1994); *Johnson v. University of Wisconsin-Eau*

Claire, 70 F.3d at 480 (employee's subjective belief that justification for adverse action was pretext does not create genuine issue of fact). According to defendants, Daley did not provide a more complete explanation of the reasons supporting the wage disparity in 1995 because he was neither asked to do so nor pressed for additional information after his initial response. Indeed, absent some other compelling motivation, such as a lawsuit, Daley had no reason to volunteer more detail. There is nothing inherently suspicious about his silence on the matter. The late emergence of the other two reasons relied on by defendants could legitimately be characterized as suspicious if they contradicted the original rationale offered by Daley. However, all three reasons are consistent with one another as well as with the general notion that defendants have resisted equalizing clerk wages because they believed that bakery and deli jobs are different from produce jobs. Plaintiffs try to convince the court otherwise by arguing that the clerk positions are in fact equal in skill, effort and responsibility. As attempts to show that defendants' position is based on bad policy, these arguments are not helpful. *See Essex*, 111 F.3d at 1310 (proof that challenged decision is based on mistake, bad policy or even plain stupidity "goes nowhere as evidence that the proffered explanation is pretextual."). Plaintiffs have produced no persuasive evidence suggesting that defendants did not honestly believe this justification or that it is a cover for discrimination.

ORDER

IT IS ORDERED that:

1. The motion for summary judgment of defendants Kohl's Food Stores, Inc. and The Great Atlantic & Pacific Tea Company, Inc. is GRANTED with respect to plaintiffs' Title VII wage discrimination claims;

2. Defendants' motion is DENIED with respect to plaintiffs' Equal Pay Act claims;

3. Plaintiffs' motion to strike is DENIED as moot; and

4. A decision on plaintiffs' motion to exclude certain evidence at trial is STAYED.

Entered this 26th day of July, 1999.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 3, 2000

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

SHIRLEY A. LANG, et al., *Plaintiffs-Appellants,* **No. 99-3377 v.** KOHL'S FOOD STORES, INC., et al., *Defendants-Appellees.*	) Appeal from the) United States District) Court for the) Western District of) Wisconsin.)) No. 98-C-351-C) Barbara B. Crabb,) *Judge.*

Order

Plaintiffs-appellants filed a petition for rehearing on July 6, 2000. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Supreme Court, U.S.
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(2)

No. 00-716

In The
Supreme Court of the United States

SHIRLEY A. LANG, *et al.*,

Petitioners,

v.

KOHL'S FOOD STORES, INC. and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals properly exercise its appellate review authority to affirm summary judgment in favor of Respondents on the ground that Petitioners had failed to present sufficient evidence to demonstrate that Respondents' articulated reasons for the wage differentials between bakery, deli and produce department employees were pretextual?

STATEMENT REQUIRED BY SUP. CT. R. 29.6

Kohl's Food Stores, Inc. is a wholly-owned subsidiary of The Great Atlantic & Pacific Tea Company, Inc. ("A&P"). A&P has no parent company, and no publicly held company owns ten percent or more of A&P's stock.

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INTRODUCTION

Respondents, Kohl's Food Stores, Inc. and The Great Atlantic & Pacific Tea Company, Inc., respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The Petition should be denied because the question presented does not involve conflicting decisions of courts of appeals or an important question of federal law; nor was the decision of the court below premised on an erroneous legal standard.

Petitioners assert that this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000) created a new controlling precedent requiring a re-examination of the factual record. But, *Reeves* did not change the law in the Seventh Circuit. Therefore, the Petition simply seeks further appellate review of the lower courts' concurrent application of *Reeves'* principles to the undisputed facts in this case. Moreover, because Petitioners failed to raise their *Reeves* argument in the Seventh Circuit, it is inappropriate for them to raise it here.

COUNTERSTATEMENT OF THE CASE

A. Factual Background[1]

Kohl's Food Stores, Inc. ("Kohl's") owns and operates retail grocery stores in the state of Wisconsin. Kohl's is a wholly-owned subsidiary of The Great Atlantic & Pacific Tea Company, Inc. (App. 21-22; R. 194 ¶ 1).

1. The Differences Between Produce, Bakery and Deli Department Jobs

Each store has a produce department, bakery department, and deli department (R. 194 ¶ 10). Bakery employees' primary functions are baking and packaging pre-baked goods (App. 40-41; R. 194 ¶¶ 167-169). Deli employees' primary function is to serve customers, e.g., slice meats and cheeses and fill containers with salads based on customer requests (App. 35; R. 194 ¶¶ 106-107). Produce employees are responsible for maintaining the freshness of highly perishable fruits and vegetables (App. 26-28; R. 194 ¶¶ 40-44, 50-51).

As found by the jury, the diverse work performed by the managers and clerks in these departments requires substantially different skill, effort and responsibility, and is performed under dissimilar working conditions. For example:

- Produce department employees are required to lift, carry and stock thousands of pounds more product each week than their bakery and deli counterparts. They also unload their own deliveries; bakery and deli employees generally do not (App. 29-31, 36-38, 43-44; R. 194 ¶¶ 77-80, 95-96, 114-117, 137-144, 181-185, 186-190).

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[1] The facts are fully set forth in the district court's decision granting summary judgment on the Title VII class claim. Set forth below is a summary of the facts which relate to the issue raised in the Petition for a Writ of Certiorari.

- Produce employees have far greater financial responsibilities since the produce departments typically generate more than twice the revenue and twice the profit generated by either the bakery or deli departments in the same stores (App. 51; R. 194 ¶¶ 210-216).

- Unlike bakery and deli employees, produce employees cannot rely on fixed "sell-by" dates to determine when to discard product (and thereby impact the store's profit margin). They have to independently judge the freshness and saleability of each perishable fruit and vegetable on their shelves (App. 27-28, 38, 43; R. 194 ¶¶ 41-43, 120, 177).

2. Kohl's Wage Scheme

Wages are set by collective bargaining between Kohl's and the United Food and Commercial Workers Union ("UFCW") (R. 194 ¶ 18). Produce and bakery employees are represented by Local 1444, and deli employees are primarily represented by Local 73A (App. 45; R. 194 ¶ 12).

Bakery and deli clerks are a subset of employees classified as "department clerks" in the labor agreements. All department clerks, regardless of their sex, are paid according to the same wage scale. Produce clerks, on the other hand, are a subset of employees classified as "regular clerks." All regular clerks, regardless of their sex, are similarly paid according to the same wage scale (App. 47; R. 194 ¶¶ 14-15). In 1995 and 1998, both Locals 1444 and 73A negotiated higher wage rates for regular clerks than department clerks (App. 49). During the relevant time period, approximately 63% of the higher-paid regular clerks were women (R. 194 ¶ 219).

The UFCW Locals which represent all Plaintiffs agreed to the wage rates at issue. Local 1444, which represents both produce and bakery managers, never proposed equalizing their wages. Local 73A, which represents deli employees, only proposed equalization for deli managers after this litigation was filed in 1998. With respect to clerks, in 1995 and 1998, the UFCW Locals offered wage proposals that would

have equalized the wages of department and regular clerks (App. 49; R. 194 ¶ 201).

Kohl's did not agree to any equalization proposals (1) because the Union did not press them and (2) Kohl's believed produce employees shouldered greater financial responsibility, exercised substantially greater independent judgment, and exerted substantially more physical effort than bakery and deli employees (App. 76; R. 194 ¶ 206). Additionally, market pressure did not drive Kohl's to equalize the wages because several of Kohl's largest competitors historically maintained the same wage differential between bakery, deli and produce employees (App. 50; R. 194 ¶ 206-208).

B. Proceedings

1. The District Court Proceedings

Petitioners' Complaint contained across-the-board allegations that Respondents discriminated against them on the basis of their gender by denying them opportunities for placement, training, promotion and compensation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and wage discrimination under the Equal Pay Act, 29 U.S.C. § 206, *et seq.* ("EPA").

Pursuant to Fed. R. Civ. P. 23(b)(2), the district court certified for class treatment only Petitioners' claim of discriminatory compensation under Title VII (R. 116). The district court also allowed the EPA claim to proceed as an opt-in representative action pursuant to 29 U.S.C. § 216(b) (R. 116).

Prior to trial, the district court granted summary judgment to Respondents on the class-wide Title VII compensation claim, holding that, regardless of whether the jobs in question were substantially equal, Petitioners had failed to present persuasive evidence that Respondents intentionally paid bakery and deli employees less than produce employees because of the gender composition of these departments

(App. 74-78). At the same time, the district court also granted summary judgment on the individual claims of the 15 named plaintiffs, leaving for trial only the EPA claim of wage discrimination (R. 255). In reaching these decisions, the district court expressly rejected evidence that Petitioners now ask this Court to consider:

> [T]he job preference statistics relied on by plaintiffs are of little persuasive value. Among other things, these statistics reveal that female hirees who expressed no job preference on their application were much more likely to be assigned to either a bakery or deli department and much less likely to end up in produce than their male counterparts. Nevertheless, plaintiffs gloss over several crucial points, not the least of which being that some of them, as department managers, 'are responsible for making many of the allegedly discriminatory employment decisions that constitute plaintiffs' gender steering claim.' *See* Op. and Order on Class Cert, Dkt. #116, at 24. As observed by defendants, the application statistics also show that the phenomenon characterized by plaintiffs as 'steering' is partially the result of self-selection; 279 of the 630-woman sample stated a preference for the bakery or deli departments, compared to just 24 of the 224 male applicants. Finally, these statistics do not account for other factors capable of influencing job assignments such as the positions and shifts that were available at the time applications were filed or any preferences expressed by applicants during the rest of the application process. *See People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997) (statistical study that 'fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in federal court.')

(R. 255 at 15-16).

On August 13, 1999, a unanimous jury returned a verdict in favor of Respondents, finding that Petitioners had failed to prove that the jobs of bakery and deli clerks and managers required substantially the same skill, effort and responsibility under similar working conditions as their produce department counterparts (R. 297).

In their post-trial pleadings, Petitioners sought, *inter alia*, reconsideration of the district court's dismissal of the Title VII compensation claims (R. 304). Petitioners argued that the district court had failed to consider their so-called "steering" evidence (*Id.* at 7-9). By order dated August 30, 1999, the district court denied the request for reconsideration (App. 16-18).

2. Seventh Circuit Proceedings

On June 22, 2000, an undivided panel of the Seventh Circuit affirmed both the jury's verdict on the EPA claim and the district court's summary judgment ruling on the Title VII claim. In an opinion by Judge Easterbrook, joined by Judges Bauer and Rovner, the court observed that the jury's verdict on the inequality of the jobs in question made Petitioners' Title VII claim untenable in the absence of proof of discriminatory hiring, *i.e.*, steering (App. 4). The court then rejected Petitioners' steering evidence as being insufficient to demonstrate intentional discrimination, holding: "Plaintiffs disavow a steering claim but contend that Kohl's history is informative on the wage-discrimination claim. The district judge did not see how, neither do we" (App. 4-5).

On July 6, 2000, Petitioners filed a petition for rehearing in the Seventh Circuit on the Title VII claim, arguing, as they did in the district court, that the panel had failed to credit their "key evidence" of alleged discriminatory steering in the 1990's. *See* Appellants' CA Pet. for Reh'g at 1.

On August 3, 2000, the Seventh Circuit denied the petition for rehearing.

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAILED TO RAISE THE QUESTION PRESENTED FOR REVIEW IN THE COURT BELOW

Petitioners argue that this Court should grant their Petition because this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000), changed the legal standard for granting summary judgment in employment discrimination cases and the court of appeals below applied the wrong standard in affirming summary judgment for defendants on the Title VII pay discrimination claim. While Respondents do not agree with this characterization of the Seventh Circuit's decision, this is not a "compelling" reason for this Court's review on a writ of certiorari. Sup. Ct. R. 10. The Petition is not based on conflicting decisions of courts of appeals; nor does it raise an "important question of federal law." *Id.* Moreover, the Petition is premised on an argument that Petitioners never raised below and have therefore waived before this Court.

Petitioners criticize the Seventh Circuit for not considering *Reeves*, suggesting that the appellate court somehow overlooked *Reeves* because it was issued ten days before the court of appeals' decision. Yet, there was no need for the Seventh Circuit to cite *Reeves*. Petitioners did not cite *Reeves* in the Seventh Circuit proceedings and, in any event, *Reeves* did not change the law in the Seventh Circuit. *See Reeves*, 120 S. Ct. at 2104 (*citing Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)).

Reeves was decided on June 12, 2000, ten days before the original decision issued by the court of appeals and twenty-four days before Petitioners filed their petition for rehearing. Indeed, Petitioners did not even mention *Reeves* in their petition for rehearing. Additionally, nearly two months passed between this Court's *Reeves* decision and the

Seventh Circuit's denial of rehearing. At no time during this window did Petitioners file a motion in the Seventh Circuit seeking supplemental briefing to make their *Reeves* argument or submit a citation of supplemental authority pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28(e).

Petitioners offer no excuse for their silence below. They cannot claim that they were unaware of the *Reeves* decision, as it was widely publicized and Petitioners' counsel have extensive experience in both individual and class action employment litigation. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Box v. A&P Tea Co.*, 772 F.2d 1372 (7th Cir. 1985), *cert. denied,* 478 U.S. 1010 (1986); *Meiressone v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989) (describing Petitioners' law firm as "a leader in the employment discrimination field")); *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370 (N.D. Ill. 1997); *EEOC v. Mitsubishi Motor Mfg., of Am., Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998).

Having failed to raise the question presented for review in a timely fashion in the court of appeals, Petitioners are not entitled to review in this Court in the absence of extraordinary circumstances, none of which have been asserted or exist in this case. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Kosak v. U. S.*, 465 U.S. 848, 850 n.3 (1984); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983).[2]

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[2] The decision in *Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company,* 520 U.S. 893 (1997), relied on by Petitioners, does not dictate a different result. There the petitioners in a diversity case raised the new state supreme court ruling in the court of appeals, thereby preserving the issue for review in this Court.

II. PETITIONERS ARE MERELY SEEKING REVIEW OF THE LOWER COURT'S FACTUAL EVALUATION OF THEIR PRETEXT EVIDENCE

This Court uniformly disfavors petitions which primarily present questions of fact. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). This is particularly true where the findings of the district court receive the concurrence of the court of appeals. In such situations, the Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

As demonstrated by the substantial factual discussion in the Petition, that is precisely what Petitioners seek in this case. They chant the mantra of "new legal precedent," but the true import of their argument is their dissatisfaction with the courts' rejection of their steering and pretext evidence as insufficient to create a triable issue of fact. Because Petitioners repeatedly put this evidence before the district court and the Seventh Circuit and called specific attention to it when they sought reconsideration/rehearing in both courts, there is no question the lower courts considered and rejected the evidence. As discussed in Section III below, the same factual evaluation of the evidence would be required under *Reeves* as was applied in the lower courts. Thus, Petitioners' reliance on *Reeves* does not get them around the fact that a re-review of the factual findings is all that is being sought here.

III. THE RECORD "TAKEN AS A WHOLE" DOES NOT SUPPORT A REASONABLE INFERENCE OF INTENTIONAL SEX-BASED PAY DISCRIMINATION

While *Reeves* involved a judgment as a matter of law under Fed. R. Civ. P. 50, this Court reiterated that the standard for summary judgment under Fed. R. Civ. P. 56 " 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' " 120 S. Ct. at 2097 (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)). In the context of summary judgment under Rule 56, a court must review the record "taken as a whole," giving "credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached.' " *Id.* (citations omitted).

This Court emphasized that simply because a plaintiff offers some evidence challenging the pretextual nature of the defendant's asserted reason for its actions, judgment as a matter of law (and, by analogy, summary judgment) is not precluded. "[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* "Whether [summary judgment] is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may be properly considered on a motion for [summary judgment]." *Id.*

A. Petitioners Are Barely Able To State A *Prima Facie* Case

Petitioners' *prima facie* case of sex-based pay discrimination was weak. In the absence of direct evidence of intentional discrimination, plaintiffs alleging pay discrimination under Title VII must establish a prima facie case by demonstrating that they were denied equal pay for "equal work" as

defined by the Equal Pay Act. *See American Nurses Ass'n. v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (discussing *County of Washington v. Gunther*, 452 U.S. 161 (1981)). In denying summary judgment on the Equal Pay Act claim, the district court repeatedly commented on how it was a close question whether the jobs in the bakery, deli and produce departments constituted "equal work."[3]

B. Petitioners' "Steering" Evidence Has No Probative Value

Against the backdrop of a weak *prima facie* case, the probative value of Petitioners' evidence of discriminatory intent and/or pretext was even weaker. Petitioners' "animus" evidence consisted primarily of decades-old hiring practices and sex-segregated wage classifications in collective bargaining agreements, many of which predated the passage of Title VII, which both the district court and the court of appeals fully considered and rejected as being probative of nothing in the 1990's. The Seventh Circuit aptly summarized the insignificance of this dust-covered evidence:

> Plaintiffs make much of evidence that until the late 1960's Kohl's not only discouraged women from applying for certain positions but also had sex-segregated wage classifications. *This practice is long gone, and no vestige of the discrimination survives*. Wage schedules were merged 31 years ago,

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[3] Ultimately, the jury concluded that these jobs did *not* involve equal work. This result was foreshadowed by the district court's observations of the distinctions between the jobs: "Differences in the content of these tasks [performed by bakery, deli and produce employees] raise questions whether they are substantially equal" (App. 67); "produce managers may use more skill [than bakery and deli managers] when minimizing shrink and placing orders" (App. 68); "whether the produce, deli and bakery positions require substantially the same effort is a closer question" (App. 69); "whether the manager jobs are substantially equal in responsibility represents yet another close question" (App. 69); produce department refrigerated working conditions "might represent the kind of sustained intensity that would justify a wage differential" (App. 73).

> and . . . women hired during the discriminatory period today receive the same wages as men hired at the same time.

(App. 4).

Petitioners' purported evidence of sex-based "steering" in the 1990's was even less probative. Even though they implicitly acknowledge that this evidence was insufficient to support either their individual or class-wide claims of steering, Petitioners nonetheless persist in insisting that this same evidence was enough to get them a trial on their class-wide wage discrimination claim. Petitioners' continued arguments in this regard demonstrate a fundamental misunderstanding of what actual "steering" evidence is.

Petitioners never identified a single female job applicant who, during the actionable period, sought and was denied a produce job or who was discouraged from applying for a produce job or from whom notice of available openings in produce jobs was withheld. To the contrary, each of the fifteen named plaintiffs uniformly testified that no one at Kohl's *ever* did or said anything which led them to believe that they could not be produce employees (R. 209 at 3). There is also no evidence of any written policy, position description or job application barring women from seeking produce positions, *e.g.*, "males only." *Compare Teamsters v. United States*, 431 U.S. 324, 356 (1977) ("whites only" sign on the hiring office door). Likewise, Petitioners offered no evidence to suggest that the hiring managers in the various stores were instructed by their corporate superiors to direct female applicants into bakery and deli positions.[4] Correspondingly, there was no evidence that any male employee was discouraged from applying to the bakery or deli departments or that

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[4] A particular irony of Petitioners' steering argument is that, given the decentralized hiring process, it would have been the female class members themselves (who were bakery and deli managers) who were responsible for hiring their own predominantly female workforces.

bakery and/or deli managers were discouraged from hiring men into their departments (R. 209 at 11).[5]

Lacking any evidence of actual steering, Petitioners, instead, relied on raw statistical data as a proxy, claiming that a rational fact finder could infer intentional discrimination from such data. This Court has cautioned that statistics "come in [an] infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (*quoting Teamsters*, 431 U.S. at 340). Petitioners' statistical evidence was fraught with deficiencies, rendering it virtually useless in supporting a "steering" argument. *See* R. 255 at 15-16.

Petitioners' assertions that the district court failed to consider their steering evidence is contrary to the record. (Pet. 7, n.3).[6] The district court contemporaneously considered Respondents' motions for summary judgment on Petitioners' class claims and on Petitioners' individual claims. Petitioners relied on the same steering evidence in opposing

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[5] Petitioners take great umbrage with the Seventh Circuit's observation that the jury's verdict on the Equal Pay Act theory effectively made their Title VII claim moot. The point the appellate court made was simple (and consistent with *Reeves)*. Without some sort of direct evidence of actual steering, Petitioners would need far more than their flimsy raw statistics to show that intentional gender discrimination was the motivation for paying different wages to unequal jobs.

[6] Somewhat inconsistently, Petitioners also assert that the district court *did* consider their evidence but applied the wrong legal standard. For example, they claim the trial court rejected their historical evidence because the statistics were not "shocking" (Pet. 7). To the contrary, the district court simply took exception to the label of "shockingly segregated" which Petitioners had sought to apply to their statistics, noting that 20% of the produce clerks were women (App. 75). Similarly, when the district court said that Petitioners' animus evidence did not "compel" a finding of wage discrimination, the court was merely characterizing the evidence as indirect, rather than direct, evidence for purposes of applying the indirect, burden-shifting method of proof paradigm established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

both motions. Therefore, in granting summary judgment on the class wage claim, the district court did not have to repeat the detailed analysis of the steering evidence set forth in its decision on the individual claims (R. 255 at 15-16). Moreover, Petitioners conveniently ignore the fact that they moved for reconsideration of the dismissal of their Title VII claim relying principally on their so-called "steering" evidence (R. 304). In denying the request for reconsideration, the district court considered the rehashed evidence, but concluded: "Nothing in plaintiffs' present submission convinces me that it is necessary to revisit those claims" (App. 16-17).

In addition to the inherent deficiencies in Petitioners' statistics, the record contains numerous other undisputed evidence that undermined Petitioners' gender segregation/steering evidence, to wit: From 1995 to 1998:

- 20% of the produce clerks were women (App. 75; R. 194 ¶ 221).
- Jobs in the higher-paid regular clerk classification, which includes produce clerks, have been predominantly held by women (R. 194 ¶ 219).
- Of all employees in clerk positions, a roughly equal number of men and women have held a higher-paid regular clerk job (R. 194 ¶ 218).
- 52.6% of female applicants desired bakery or deli positions (R. 86 ¶ 5).
- Among all applicants who expressed preferences for particular jobs, a higher percentage of women (52.6%) than men (48%) received a job they requested (R. 86 ¶ 6).
- The average pay rates of women in clerk positions generally exceeded the average pay rates of men in clerk positions in more than half of the years since 1983 (App. 49; R. 194 ¶ 222).
- Since October 1992, the negotiated hourly wages of bakery and deli managers have increased at a

higher rate than the hourly wages of produce managers (App. 49-50; R. 194 ¶ 202).

- Department clerks have received greater percentage wage increases than regular clerks at the same pay levels (App. 49; R. 194 ¶ 203).

C. Petitioners' Pretext Evidence Did Not Establish That Kohl's Proffered Reason For The Wage Differential Was Unworthy of Credence

Petitioners admit that their only evidence of pretext consisted of their attempts to impeach the credibility of Kohl's labor negotiator, Dan Daley. They do not contend that the courts below failed to consider this evidence. They simply disagree with the courts' assessment that their impeachment efforts were insufficient to support a reasonable inference of pretext.

Here, again, Petitioners claim *Reeves* offers them salvation with its statement that, at the summary judgment stage, a court must disregard any evidence offered by the moving party that has been contradicted or impeached. However, in this case the lower courts did not violate this teaching of *Reeves*. Rather, they concluded that Petitioners had failed in their attempts to discredit Daley's testimony, thereby leaving it unimpeached and uncontradicted.

Petitioners have mischaracterized Daley's so-called "admissions" as being misrepresentations of material facts. A brief, but truer, review of the record demonstrates that Petitioners have not accurately described the evidence to this Court.[7]

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[7] Unfortunately, this is not the first time in this litigation that Petitioners have misrepresented the record evidence to avoid an adverse result. *See* District Court Order Granting Summary Judgment on Plaintiffs' Individual Claims ("[T]here are troubling contradictions between deposition testimony provided by plaintiffs and representations made on plaintiffs' behalf by their counsel") (R. 255 at 13-14).

Petitioners' mischaracterizations of Daley's deposition testimony are myriad:

- Daley did not testify that he developed Kohl's reasons for the pay differential after the wage rates were negotiated (Pet. at 6). He simply testified that he never explained them to anyone at Kohl's, although he discussed the relative contributions of the various departments with lead negotiator John Rogers (R. 215 at 233-35).

- While Daley acknowledged that Kohl's did not have any documents specifically stating the reasons for the pay differential, Kohl's, through Daley, produced numerous documents which contain evidence of the differences between departments in sales, gross profitability, product freshness, product weight and shipments (R. 212 ¶ 63).

- Daley did not testify that physical effort, financial contribution, and independent judgment did not account for the pay disparity. Rather, he could not state what *percentage* of the pay disparity was specifically attributable to each of these individual factors (R. 215 at 246).

Daley's error as to *when* in the 1990's the union proposed wage restructuring does nothing to discredit his testimony as to *why* Kohl's maintained the wage differential. Similarly, the fact that Daley lacked personal knowledge but had only been told by the unions that the wage gap arose in the 1960's when grocery stores first incorporated bakeries and delis inside the stores is irrelevant to the issue of why Kohl's paid bakery and deli employees different from produce employees in the 1990's.

These kinds of attack on a decisionmaker's credibility are insufficient to impeach his substantive testimony concerning the employer's rationale for its actions. When the record clearly demonstrates that differences in effort, responsibility, revenue and profitability exist between the jobs in question, and these are the articulated reasons for the wage differential, Petitioners had to do more than criticize

the documentation or lack of communication on the issue to show pretext. As the district court observed, Daley did not have to give the union a complete explanation of all the reasons for the wage disparity in 1995 "because he was neither asked to do so nor pressed for additional information after his initial response. . . . [A]bsent some other compelling motivation, such as a lawsuit, Daley had no reason to volunteer more detail. There is nothing inherently suspicious about his silence on the matter." (App. 78). *See also Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) ("[s]imply because an explanation comes after the beginning of litigation does not make it inherently incredible"); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (fact that the employer did not document its reasons for not promoting the plaintiff until after the plaintiff sued failed to establish pretext); *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992) (refusing to give substantial weight to a position initially asserted in an administrative proceeding because "myriad factors undoubtedly influence the positions taken in such a forum").

CONCLUSION

Not every summary judgment case can or should be reviewed by this Court. Nor should such cases be remanded for further consideration in the court of appeals just because a new decision has issued in this Court which neither alters the legal standard, nor the outcome, in the courts below. Given the commonplace nature of the summary judgment proceedings here, if certiorari is granted or remand ordered in this case, there would be hundreds of summary judgment cases which this Court would similarly have to consider. Accordingly, and for all the foregoing reasons herein, the Petition for a Writ of Certiorari should be denied.

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(3)

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In The

Supreme Court of the United States

SHIRLEY A. LANG, *et al.*,

Petitioners,

v.

KOHL'S FOOD STORES, INC. and
THE GREAT ATLANTIC TEA COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners seek a writ of certiorari or, in the alternative, a "GVR" in light of *Reeves v. Sanderson Plumbers, Inc.* ___ U.S. ___, 120 S.Ct. 2097 (2000). Noted for its rejection of the "pretext-plus" rule, *Reeves* also clarified the standard of summary judgment review by directing that courts must *disregard* evidence supporting the moving party if it is either contradicted or impeached. 120 S.Ct. at 2110. This explicit directive was clearly not followed by the court below, which *credited* decision-maker Dan Daley's testimony supporting respondents' position that the challenged wage decisions were motivated by differences among the jobs at issue, when that testimony should have been *disregarded* because it was impeached by untruths and contradicted by admissions suggesting that the job differences were *not* the motivation for the wage decision. *See infra.* Had the court analyzed the record as required by *Reeves* (rather than affirming the district court ruling without analysis at all), it would have reversed the district court and remanded the Title VII claim for a trial by jury.

I. Respondents' Waiver Argument Is Groundless

Petitioners argued throughout the appeal proceedings that the wrong standard of review was applied. (Brief of Plaintiffs-Appellants at 28-34; Reply Brief of Plaintiffs-Appellants at 2-14) This Court's clarification of the standard in *Reeves*, decided ten days before the opinion below, made petitioners' argument airtight.

Respondents argue nonetheless that petitioners waived their right to rely on *Reeves* because they did not cite the decision to the court of appeals. However, this Court granted a GVR under virtually identical circumstances in *Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company*, 520 U.S. 893 (1997), where an important state court decision issued shortly before the court of appeals opinion was unknown

to the petitioner until after his rehearing petition was denied.[1] While the petitioner had attempted a "second" petition asking the court to recall its already issued mandate based on the state court decision, the motion was denied as "without merit." 520 U.S. at 895. This was most likely, according to this Court's opinion, because the court of appeals lacked jurisdiction to consider it. *Id.* at 896-97.

Respondents in the present case do not argue that petitioners could have acted in the court of appeals after their rehearing petition was denied. (*See* Opp. at 7-8, ending "window" for filing supplemental petition with the court's order denying petition for rehearing.) Hence, petitioners are in no different position from the petitioner in *Lords*. As there is no basis for believing that *Reeves* was considered or applied below, the relief petitioners seek should be granted.

II. Petitioners Are Not Seeking Mere Fact Review

Respondents' contention that the petition seeks mere fact review is wrong. Petitioners challenge the lower court's failure to analyze the record as required by *Reeves*.

That the court of appeals affirmed the district court without making its own analysis does not make the standards announced in *Reeves* less binding. Indeed, by simply adopting the district court's conclusion that petitioners' pretext evidence was "not persuasive," the court of appeals credited testimony it should have disregarded under *Reeves* and ignored evidence it should have considered.[2]

---

[1] In the present case, petitioners were also unaware of the standard-of-review holding in *Reeves* until after their rehearing petition was denied.

[2] Notably, the Opposition persists in respondents' perennial mischaracterization of petitioners' burden. That is,

Respondents do not defend (or even identify) the standard of review applied by the court below. There was none. Rather, they argue the facts in an attempt to demonstrate that Daley's testimony was not contradicted or impeached, and that it was therefore properly credited as the basis for the court's ruling. Given this position, petitioners use this Reply to identify the contradictions and impeaching evidence with specificity (as this Court also did in the *Reeves* opinion itself) *not* because they seek a reevaluation of facts, but merely to establish precisely why Daley's testimony should have been disregarded.

III. Daley's Asserted Reasons For The Wage Gap Were Contradicted And Impeached By His Own Admissions

The lower court's rejection of the Title VII claim turned on Daley's justification for maintaining the wage gap. That justification had two essential components. First, Daley identified differences among the produce, bakery and deli jobs in revenues, independent judgment and lifting. Second, he asserted that these differences were the reason for respondents' wage decisions. This second proposition was essential to respondents' defense since, even if the jobs were not different,[3] the asserted

---

respondents' Question Presented for Review suggests that petitioners had to "demonstrate" that the asserted justifications were pretext (Opp. at i); and their Opposition argues that petitioners had to "establish" that the justifications were unworthy of credence. (Opp. at 15) Petitioners were not required to demonstrate or establish pretext to avoid summary judgment, however, but merely to raise an issue of fact for the jury.

[3] Respondents' argument about the closeness of petitioners' *prima facie* case on the equality of the jobs is a red herring, since it was not required that the jobs be equal for petitioners to sustain their Title VII claim. Bound by the jury's

differences are no defense under Title VII, 42 U.S.C. § 2000e, unless they actually motivated the wage decisions.

It was this second proposition that was contradicted and impeached, in that petitioners' presented substantial evidence that the differences were *not* in fact considered by respondents when they set wages: *i.e.*, evidence that the job differences were not developed until after the wage negotiations were completed, evidence that the particular differences were not actually factored into the wage-setting process, and evidence that no link between the job differences and the wage decision was ever documented.

1. Regarding the *post-hoc* character of Daley's justifications, Daley testified:

> Q. When was the first time you ever articulated these three reasons as the reasons?
>
> A. After it was presented to me during the '95 negotiations . . . I started to put it together after the fact.
>
> Q. . . . So before that you had not put it together, is that fair to say?
>
> A. That's correct.
>
> . . .
>
> Q. And before that you had never told anybody that these were the reasons, is that correct?
>
> A. No.

---

verdict in the Equal Pay Act case, petitioners make their case for intentional discrimination by the direct method of proof under *County of Washington v. Gunther*, 452 U.S. 161, 178-81 (1981), which established that Title VII barred wage differences between *dissimilar* jobs as long as they were based on the employees' gender. Petitioners' evidence of pretext is "simply one form of circumstantial evidence [along with petitioners' other evidence] that is probative of intentional discrimination." *Reeves*, 120 S.Ct. at 2108.

> Q. No, you had not told anybody?
>
> A. No, I had not told anybody before that.

R. 215 at 232; and:

> Q. . . . you testified just a while ago that you really put together the reasons after the 1995 negotiations?
>
> A. That's correct. But I did have my experience before then.
>
> Q. But you never used that experience to determine what the wage rate was, had you?
>
> A No.

Id. at 254-55. As respondents concede (Opp. at 16), Daley never told anybody in management – including any of his colleagues on the negotiating team – about the reasons for the wage gap. (*Id.* at 232-35) Indeed, contrary to respondents' claim, Daley did not testify that he "discussed the relative contributions of the various departments with lead negotiator John Rogers." (Opp. at 16) All he was able to say was that he "may have" said "something to this effect" to Mr. Rogers. (R. 215 at 233-34) In fact, Daley admitted that he did not discuss the three reasons for the wage gap with Mr. Rogers. *Id.*

2. Daley also made a series of admissions suggesting that the asserted job differences were *not* considered when wages were set.

a. Regarding the employees' exercise of independent judgment, for example, he testified:

> Q. What part of the pay disparity between produce managers and clerks is attributable to the fact that you believe that they use more independent judgments than deli or bakery clerks?
>
> A. I have no part of the disparity that I would associate with that.

Id. at 246.

b. Regarding the employees' relative contribution to revenues, Daley admitted that throughout the stores in

general, wages were *not* tied to the revenues a department generated (R. 198 at ¶ 205); and, when asked, "Why do you think it makes sense to pay employees whose departments generate more revenues, more money per hour?" Daley answered:

> A. I have no thoughts on that at all.
>
> Q. None at all?
>
> A. None at all.

Id. at 238.

c. Regarding product volume, Daley testified:

> Q. [H]ow is the fact that produce departments . . . move more product factored into the wage rate that they receive?
>
> A. It's not part of the factor [sic].

Id. at 271.

d. Regarding lifting, Daley testified:

> Q. [W]hy is it a reason to pay someone more because they lift more weight?
>
> A. It takes more physical effort.
>
> Q. And is that a factor that you have used throughout the store?
>
> A. No.
>
> Q. Are there other positions where people are paid more because they lift more weight than other people in the store?
>
> A. No.

Id. at 252-53.

Finally, Daley admitted that respondents had no documents "reflecting that these [differences] are actually the reasons for the pay disparity." (*Id.* at 235) Respondents miss the point in responding that many documents were produced that reflected differences among the jobs in sales, profits, weights, etc. (Opp. at 16) The issue is not whether there were differences among the jobs (as the jury found there were), but whether such differences

motivated the wage decisions. Undisputedly, there are no documents linking the differences to the wage decisions. *See Reeves*, 120 S.Ct. at 2111. (distinguishing documents evidencing inaccurate record keeping from evidence that the inaccurate documents were intentionally falsified)

In addition, petitioners impeached Daley's credibility by demonstrating material untruths in his explanation of the wage gap. ("A factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'." *Reeves*, 120 S.Ct. at 2108; *id.* at 2112 (Ginsburg, J., concurring) Whether, as respondents argue, the misrepresentations were the result of innocent error was a question of interpretation for the jury, not the court. That they were not material is simply wrong.

The first of the misrepresentations was Daley's testimony that the unions did not demand wage equalization until 1998 – when in fact the unions did so in every bargaining proposal since 1992. (Compare R. 178 at ¶201 and R. 217 at ¶¶57-61.) Contrary to respondents' claim, this was not merely an error in timing. Daley's testimony plainly suggested and respondents' brief to the court of appeals (at 8) explicitly stated that the unions' putative acceptance of the wage gap was *a reason* why wages were not equalized.

The second misrepresentation was Daley's explanation of the wage gap as the product of neutral market forces in the 1960s. The real story of the wage gap's origins was far from gender-neutral. (*See* Petition at 5, describing the explicitly discriminatory job classification and wage scheme respondents negotiated during those years. R. 305 at ¶¶ 1-2, R. 217, Exs. 1-3) A jury could have reasonably inferred – from Daley's self-serving and inaccurate account of the history of the wage gap – that his explanations for maintaining it in the 1990s were not credible.

Thus contradicted and impeached, Daley's testimony should have been disregarded as a basis for summary judgment under *Reeves*.

IV. Petitioners' Steering Evidence Should Not Have Been Ignored

A substantial portion of respondents' brief is devoted to respondents' attack on petitioners' steering evidence – which the court of appeals opinion states was never offered, even though, as respondent concedes, petitioners "repeatedly put this evidence before the district court and the Seventh Circuit and called specific attention to it when they sought reconsideration/rehearing in both courts . . . " (Opp. at 9)[4]

The steering analysis was indeed "real" evidence of job steering during the 1990s. (*See* Opp. at 12) Focussing on where respondent had placed hundreds of applicants who had not specified a preferred position in either bakery, deli, or produce in their applications, the analysis revealed stark disproportions by gender. That is, respondents had placed 82% of the women who did not request any of the jobs, as compared to 34% of the men, in bakery and deli; and it had placed 47% of the men, as compared to 3.7% of the women, in produce. (R. 196, Ex. 6, Table 2) This disproportion far exceeded the traditional 80% rule. (R. 305 at ¶1) Thus, though they did not address what happened to those few women who were bold enough to

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[4] Petitioners never acknowledged that their evidence was not probative. Their decision not to appeal from the dismissal of their individual claims or the district court's refusal to certify the steering claim was based on other factors. As stated in the Petition (at 7, n.3), the named plaintiffs were all hired long before the actionable period. At most, they could claim that they were discouraged from seeking transfers to produce, but they were not well-positioned to pursue the classwide steering claim the district court had declined to certify.

ask for jobs in produce, petitioners' data were powerful evidence of respondents' attitude that the women belonged in the lower paying deli and bakery jobs.

Respondents contend that the analysis was properly rejected because it did not account for the possibility that some applicants requested jobs outside the written application or the uncertainty over which jobs were open when the applications were made. While the district court accepted this argument, it was contrary to this Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), which holds that a statistical analysis should not be excluded from evidence merely because it addresses fewer than all possible variables – particularly where the effect of the "missing variable" is speculative, as it was here. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) Respondents presented no evidence either that any woman in the three years covered by the data ever asked for a job in bakery or deli, or that only bakery and deli jobs were available when the women applied, while produce jobs came vacant only when the men applied. Given the stark disproportions the data revealed, the possibility that these "missing variables" would explain them away was too remote to defeat summary judgment.[5]

---

[5] Respondents' counter-facts (Opp. at 14-15) do not support the lower court either. Even if they were accurate (and petitioners demonstrated below they were not, Appellants' Reply Brief at 9-11), they would at most provide the basis for arguments to the jury at trial. They do not entitle respondents to inferences in their favor at the summary judgment stage, nor deprive petitioners of the right to *their* inferences. *See Reeves*, 120 S.Ct. at 2111, citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (counter-evidence that workforce is racially balanced, while "not wholly irrelevant," was not "sufficient to *conclusively* demonstrate that [the employer's] actions were not discriminatorily motivated.") (emphasis in original).

CONCLUSION

The decision below plainly abrogated the standards for summary judgment review established by the Court, did not consider this Court's emphatic clarification of those standards in *Reeves*, and would have reached a different conclusion if it had. Accordingly, for all the reasons set forth in the Petition and this Reply, the Petition for a Writ of Certiorari should be granted or, in the alternative, the matter remanded for reconsideration in light of *Reeves*.

Respectfully submitted,

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